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## Undesirable and Unreturnable Migrants

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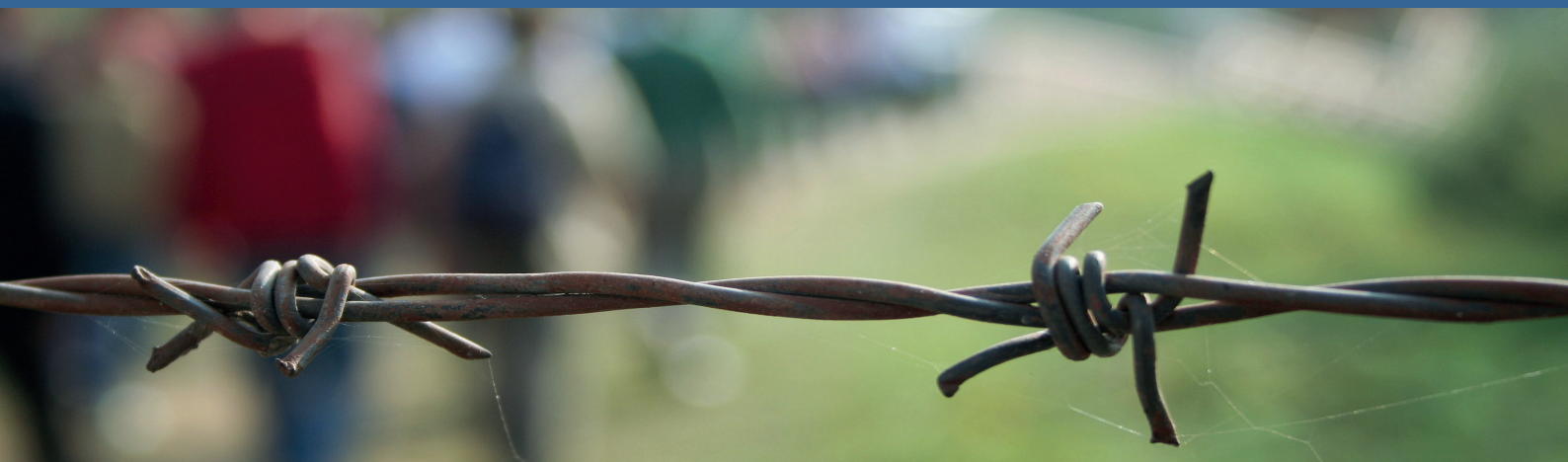
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# Undesirable and Unreturnable?

Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed

A project funded by the Arts and Humanities Research Council

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# Undesirable but Unreturnable Migrants

<b>Undesirable but Unreturnable Migrants: Policy Brief</b>	3
<b>Undesirable but Unreturnable Migrants: Conference Report</b>	8
<b>Session 1: Prosecuting undesirable and unreturnable migrants</b>	
Prosecution of undesirable and unreturnable persons	8
Undesirable yet unreturnable – extradition and other forms of rendition	8
When international criminal justice concludes: undesirable but unreturnable individuals at the ICC	9
First panel discussion	10
<b>Session 2: Other measures for addressing UBUs</b>	
Deporting undesirable migrants: diplomatic assurances and the challenge of human rights	11
Removal, voluntary return and relocation: a case study of 1f excluded individuals in the Netherlands	11
Second panel discussion	12
<b>Session 3: Practice in the European Union, civil law jurisdictions I</b>	
New exceptions to the principle of <i>non-refoulement</i> : the German case	13
Undesirable and unreturnable migrants under French law: between legal uncertainty and legal vacuum	13
Non-removable migrants suspected or convicted of serious crimes in the Netherlands	14
Third panel discussion	15
<b>Session 4: Practice of European States, civil law jurisdictions II</b>	
The situation of undesirable/unreturnable migrants in Norway	16
Undesirable and unreturnable: a case study of Italy	16
The indefinite detention of undesirable and unreturnable third country nationals in Greece	17
Fourth panel discussion	18
<b>Session 5: Approaches in common law jurisdictions (UK/Australia)</b>	
Country report: Australia	19
Undesirable and unreturnable in the United Kingdom	20
Undesirable, unreturnable and no effective remedy: UK country report	21
Fifth panel discussion	22
<b>Session 6: Approaches in common law jurisdictions (North America)</b>	
Country report: Canada	23
Deportation and detention in the US: human rights principles and the treatment of unreturnable migrants	23
Sixth panel discussion	24
<b>Session 7: Approaches in other countries</b>	
Undesirable and unreturnable in Brazil: refuge, exclusion and illegal acts	25
Turkey: the challenging problem of ‘undesirable and unreturnable’ asylum seekers	25
Invisible people: suspected LTTE fighters in special refugee camps of Tamilnadu	26
Seventh panel discussion	26
<b>Session 8: Approaches by international organizations</b>	
Refugee adjudication under the UNHCR’s statute or mandate and the exclusion dilemma	28
Union law solutions for excluded persons	28
Non-removable returnees under European Union law – status quo and possible developments	29
Eighth panel discussion	30
<b>Session 9: Roundtable discussion: Towards harmonised solutions</b>	
Scope	31
Policy response	32
<b>Appendix: Conference programme</b>	33



# Undesirable but Unreturnable Migrants

## Policy Brief

### Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed

A project funded by the Arts and Humanities Research Council

Migrants who are *undesirable* because of alleged involvement in serious criminality but *unreturnable* because of legal or practical reasons may present decision makers, policy makers and the responsible politicians with significant challenges. While there are different short-term policy responses to the issue, a considerable group of these individuals will always remain in legal limbo, sometimes for many years. A coherent solution is currently lacking, as is guidance on how to deal with this group of persons. Building upon two network meetings with academics and practitioners, this document defines the problem, describes current state responses and explores possibilities of future policy solutions.

## The problem

States are increasingly confronted with migrants who are Undesirable but Unreturnable (UBUs).

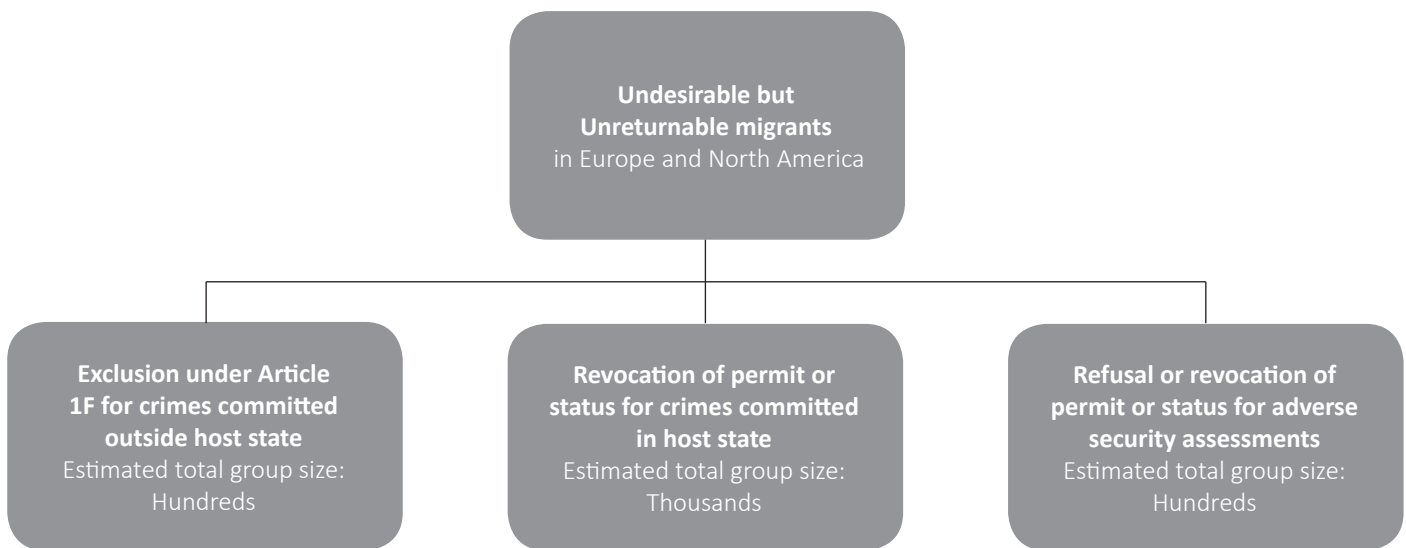
*Undesirability* is caused by three types of exclusion which relate to serious criminality:

- i) Exclusion of asylum seekers believed to have committed crimes *before* arriving in the host state under Article 1F Refugee Convention. While it is difficult to determine the size of this group, it appears relatively small. However it is likely to grow in the near future;
- ii) Revoking status of persons who commit crimes *after* arriving in the host state. From the available data this group appears relatively large and is likely to grow in the near future;
- iii) Not granting or revoking a status because of *current and future* security concerns in the host state. This issue appears relatively small in scale but is expected to grow in the near future.

*Unreturnability* exists because of (i) legal or (ii) practical reasons, most importantly:

- i) The principle of non-refoulement; forced removal to the country of origin is not permitted under e.g. the European Convention on Human Rights (ECHR) or the Convention Against Torture (CAT) where there is a real risk of serious harm to the individual;
- ii) Lack of travel documents, non-cooperation by excluded individual or state of origin frustrate return.

It is difficult to determine the size of this problem in countries in the Global South. However, for countries in close proximity to conflict situations (e.g. Turkey) this is likely to represent a growing problem in the future.



### A heterogeneous group

The group of UBUs is highly diverse. Arguably, from the point of view of public policy some UBUs are ‘more undesirable’ than others. Some are deemed ‘undeserving’ of refugee protection because of alleged war crimes that may have occurred years ago in far-away countries, and may not pose an acute security threat to the receiving country. At the other end of the spectrum, others may be convicted terrorists who continue to pose a concrete threat to the host state’s public order or public security. Arguably, in terms of political sensitivity, one may differentiate between the following groups on a continuum:

- Alleged or convicted perpetrators of relatively non-serious crimes ‘conventional’ crimes committed in the host country (e.g. economic crimes)
- Alleged or convicted perpetrators of relatively serious ‘international crimes’ committed abroad (war crimes, crimes against humanity, genocide)
- Alleged or convicted perpetrators of serious ‘conventional’ crimes committed in the host country and ‘security cases’ (e.g. rape, murder, terrorism)

### Existing policy responses

Most states periodically assess if and to what extent return or other modes of removal are possible. They are allowed to temporarily detain UBUs when swift return or removal is considered to be a realistic prospect. When such a prospect is lacking, states apply a variety of different policy responses in dealing with UBUs. During the network meetings the following approaches were discussed:

- *Extradite or transfer* UBUs to a state or international tribunal or court willing to prosecute. This only affects a small number of individuals. International tribunals and courts are only interested in prosecuting a limited number of individuals, typically those individuals considered to be the ‘most responsible’ or directly involved. States are often not interested in prosecuting UBUs as most of them are low level perpetrators with indirect involvement. If they are interested, extradition may be blocked because of human rights or fair trial concerns.
- *Domestically prosecute* UBUs on the basis of universal jurisdiction. This only affects a small number of individuals. For example, since 1994 only just over 50 1F-excluded individuals have been successfully domestically prosecuted worldwide. Such prosecutions are extremely resource-intensive and complex because of the nature of the alleged crimes and the context in which they allegedly took place.
- *Create diplomatic assurances* to address human rights concerns in a third state and enable removal. As concluding such assurances takes a large amount of time and resources, this too only affects a small number of cases.
- *Provide temporary residence permits*. With the above options not available in many cases, various states temporarily ‘tolerate’ the stay of UBUs, either through already existing schemes (e.g. Germany) or by providing tailored schemes (e.g. Norway, the UK, Denmark). Different modalities exist; some states grant a status which allows the UBU to e.g. work, rent a house and enjoy health insurance, others include serious restrictions and may include possibilities of home detention or electronic monitoring (e.g. France). See annex 1 for an overview of different policies that exist in relation to 1F-excluded individuals in developed countries.
- *Do not provide any status*. A limited number of states (e.g. The Netherlands, Belgium) do not provide any temporary residence permit or leave to remain. This means that the UBUs are considered undocumented migrants and are not allowed to work, rent a house or enjoy health insurance.

- *Indefinite detention.* European and North American countries can only temporarily detain UBUs in cases where swift return or removal is considered a realistic option. Indefinite detention is not allowed. In contrast, in Australia UBUs can be detained even where swift relocation to third countries is not possible. De facto, this might mean indefinite detention.

### Effects of existing policy responses

Current policy responses are often ad-hoc in nature and do not provide any structural or long term solutions on how to deal with protracted situations of undesirability and unreturnability. For the individuals concerned, existing policy responses may have severe social, economic, physical and psychological consequences. A situation that may persist for many years, if not decades. At the same time, governments are often criticized for ‘hosting criminals’. Public perception on the issue is, however, mixed. In some countries the (temporary) ‘toleration’ of UBUs seems to be accepted or is not given a great deal of attention in the media or in politics. In other countries the topic is highly politicized. Governments may on the one hand be criticized for having deemed members of particular groups undesirable too easily (e.g. the Netherlands in relation to high-ranking Afghan Khad/WAD members) or, on the other hand, of too readily granting human rights protection to alleged offenders (e.g. the UK).

### Directions of future policy solutions

The lack of a coherent policy response to the issue suggests there is a need for guidance. During the network meetings it was agreed that first steps to deal with the matter could be to implement measures that can limit the number of (allegedly) criminal migrants ending up in legal limbo. In this regard one could think of either (i) decreasing the number of persons deemed to be undesirables, or (ii) increasing the number of returns and/or removals.

- *Decreasing the number of undesirables* could e.g. be done by narrowing categories of crimes that may lead to refusal or revocation of citizenship to only truly serious crimes, by limiting the number of 1F exclusions and by investing more in criminal prosecution.
- *Increasing the number of returns and removals* could e.g. be done by investing in the rule of law in countries of origin, facilitating extradition (e.g. by investing in criminal justice system in country of origin), providing UBUs incentives to return voluntarily and by more actively inducing third countries to consider relocation, by improving administrative procedures related to return or by more actively engaging in setting up diplomatic assurances/Memoranda of Understanding with third states, including collective ones.

The above measures may limit the scale of the problem. But whatever measures are taken, countries will continue to be faced with a limited number of UBUs in a protracted situation of limbo, possibly indefinitely. For this reason there remains a need to formulate long-term solutions to address the issue. During the network meetings various options were discussed, of which the prospect of creating a ‘balancing test’ seemed most promising. For example, in case a UBU has demonstrably not been in the position to return for 10/15/20 years a judge could weigh the interests of the state to prolong the status of undesirability (level of acute security threat, seriousness of the alleged crimes, mode of complicity, level of responsibility) against the UBU’s interests of having the status of undesirability lifted (social, psychological, physical impact of protracted limbo situation). Even if this is done, there will remain a number of individuals who continue to be in limbo; government might channel their resources to try and extraterritorially prosecute or extradite that (much lower) number.

Without a coordinating body pushing for and overseeing the implementation of a harmonized and coherent approach, it is not likely that this will take shape in the near future. So far, UNHCR has considered the issue of unreturnable 1F-excluded asylum seekers to fall outside its mandate. It has not published any guidance in this regard. The EU recently steered a brainstorming with Member States experts on a harmonised approach in regularising irregular migrants – undesirable migrants included – who cannot be returned. Suggested criteria to take into account ranged from the level of cooperation of the migrants, the length of factual stay and integration efforts made by the migrant, to family links and the need to avoid rewarding irregularity. Member States experts seemed, however, to unanimously reject this proposal. Arguably they prefer retaining full discretionary powers in dealing with such matters, rather than being subjected to a harmonized approach.

The inactivity of the EU or UNCHR should however not bar countries to independently develop structural solutions to this issue. A number of countries – in particular in Scandinavia – are already working on developing long term policies. The findings of this project, and the various academic publications that will follow, can help countries in shaping such solutions.



## Annex 1

## Access to temporary residence permits for, and conditions imposed on, 1F-excluded UBUs in developed countries \*

Country	Temporary residence permit	Duration	Access to employment	Restrictions w/r place of residence	Monitoring	Prospect of permanent status
Australia	No	-	No	Detention	No	No
Belgium	No	-	No	No	No	No
Denmark	No	-	No	Yes, housed in designated asylum centre	Yes, daily reporting duty to police, assessment of possibilities of return every 6 months	No
France	No	-	No	Yes, home custody, designated place of residence or detention	Yes, reporting duty to police	No
Germany	Yes	Up to a few months at a time	Yes, possibility to apply for work permit after 3 months	Yes, designated area of residence	Yes, assessment of possibilities of return on reapplication	Yes, possibility to apply for permanent residence after 18 months
Netherlands	No	-	No	No	Yes, assessment of possibilities of return, in principle every 6 months	No, unless on humanitarian ground or on the basis of 'durability and proportionality test'
Norway	Yes	7 months at a time	Yes, under conditions	No	Yes, assessment of possibilities of return on reapplication	Yes, possibility to apply for permanent residence after 10 years, but strict conditions
Sweden	Yes	12 months at a time	Yes	No	Yes, assessment of possibilities of return on reapplication	Yes, after several renewals, depending on seriousness of crime
UK	Yes	6 months at a time	Yes, under conditions, based on risk assessment	Yes, degree based on risk assessment	Yes, assessment of possibilities of return on reapplication	No

\* Canada and the United States have not been included in this table. The overlapping admissibility and exclusion schemes in Canada mean the situation is too complex to be adequately reflected in this table. For a detailed analysis of the measures imposed in Canada, please see Bond's country report on Canada. The approach to excluded individuals in the United States also makes it unsuitable for inclusion. Although in the United States there exist various bars to asylum on account of suspected involvement with criminal and terrorist activity, Article 1F of the Refugee Convention is not applied in its traditional sense and as a result the situation in the United States is not suitable for comparison with other developed countries.

# **‘Undesirable but unreturnable?’ Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality but who cannot be removed**

**International conference, 25–26 January 2016**

**Conference Report**

**Institute of Advanced Legal Studies, University of London**

The conference was introduced by Dr David Cantor and Dr Joris van Wijk, who set out the scope and purpose of the two-day event. The conference came about through a network comprised of academics and policy makers looking into post-exclusion issues, namely, what to do when asylum seekers are excluded from refugee status on account of suspected criminality but cannot be returned to their country of origin or former habitual residence. Consideration of this issue led to another question, namely: how do States respond to other migrants accused of serious criminality who similarly cannot be removed?

Since the inception of the network, the focus has therefore broadened to include three types of Undesirables but Unreturnable migrants (UBUs):

- i) non-nationals the host State has serious reasons to consider have committed serious crimes before entering the territory of the host State;
- ii) non-nationals who have committed a serious crime after arriving in the host country; and
- iii) non-nationals who are deemed to be a threat to the national security of the host country.

The reasons these groups are often unreturnable are varied, ranging from human rights concerns in their home country to practical obstacles to removal, for example lack of identity documents or cooperation from the country of origin.

Turning to available responses, States have responded to UBUs through a variety of measures, including prosecution, detention, extradition, removal to a safe third country, grants of temporary leave or simple inaction. State responses to UBUs are typically short-term in nature, which leaves many UBUs in legal and practical limbo, often for considerable lengths of time.

The format of the two-day conference was split between thematic issues and country reports. Day one began by looking at thematic issues surrounding UBUs and the responses available to States. This included criminal law responses to UBUs – prosecution, extradition and the conclusion of criminal justice – and other measures such as the use of diplomatic assurances, voluntary return and relocation. The presentations then moved on to discuss country-specific reports focusing on European civil law jurisdictions. Day two began by looking at country reports on common law jurisdictions before turning to consider State responses in selected countries in the Global South. This was followed by presentations on the perspectives of international institutions (namely UNHCR and the European Union), and the conference concluded with a roundtable discussion on how it might be possible for States to move towards harmonised solutions in this area. The diverse range of presentations, discussions and final roundtable provide a unique opportunity also to develop practical and meaningful policy proposals.

## Day One

### Session 1: Prosecuting undesirable and unreturnable migrants

#### Prosecution of undesirable and unreturnable persons

*Dr Joseph Rikhof, University of Ottawa, Dept. of Justice, Canada*

Dr Rikhof opened the first session by discussing the complex issue of prosecution in relation to UBUs. His talk focused on asylum seekers who have been excluded from refugee status due to suspected involvement in serious crimes as set out by Article 1F of the 1951 Refugee Convention (1F-excluded persons) but who are unable to be removed due to legal or practical obstacles.

Dr Rikhof considered the terms undesirable and unreturnable as potentially wide in scope. For example a person could be considered undesirable based on alleged criminality ranging from international crimes to small petty crimes. Furthermore, the concept of unreturnability could stem from vastly different obstacles to removal, including lack of commitment to human rights treaties in the home state, medical issues to more practical issues such as lack of travel documents. Dr Rikhof set out four groups of undesirables: (i) non-refugees that have committed crimes before arriving in the host State; (ii) non-refugees and migrants that commit crimes in the host state; (iii) refugees that are involved in undesirable activities after they have arrived in the host state; and (iv) refugees who committed crimes before they arrived in the host state.

For this last group of persons (1F-excluded persons), the scale of the problem is small in terms of numbers. Additionally, prosecutions have been rare and are likely to remain so even if the number of exclusions increases. Between 1994 and 2016, 14 countries (within Europe and North America) have initiated 51 criminal proceedings for crimes committed outside of their territory (applying extra-territorial jurisdiction), which resulted in 48 convictions in total. Most crimes that have been prosecuted in these countries have been serious international crimes that fall under 1F(a) such as crimes against humanity, war crimes, genocide and torture (although some European countries such as Belgium, Denmark and Germany have exercised universal jurisdiction for common crimes under 1F(b) or (c), though this has only been used sparingly).

A running theme throughout the conference is the lack of data on these issues. However, the Netherlands is one country where data is available regarding excluded asylum seekers and prosecutions. Between 1992 and 2014, while 920 asylum seekers were excluded by reference to 1F, nine criminal proceedings were started against only 14 people, of which only 12 were successfully prosecuted, making that an exclusion/conviction rate of 1.4 per cent. For other countries such as France, Belgium and Canada, the prosecution rate is even lower.

Dr Rikhof's findings suggest prosecution of these 1F-excluded persons is incredibly difficult for a number of reasons. First,

they often involve international or transnational crimes, such as genocide or terrorism, which are often complex crimes. Second, practical issues such as permission to investigate on the territory of the third country is not always straightforward. Third, even when an investigation starts, dealing with different legal systems and locating and interviewing witnesses is incredibly time-consuming and expensive. For example one investigation and prosecution in Canada reportedly cost 4 million Canadian dollars.

While not viewing prosecution as a complete or even partial solution to the problem of UBUs, Dr Rikhof noted that a criminal justice approach is nevertheless an important tool in combating impunity from justice and in light of its deterrent effects.

#### Undesirable yet unreturnable – extradition and other forms of rendition

*Professor Geoff Gilbert, University of Essex, UK*

Professor Gilbert discussed how extradition and rendition can be used to avoid impunity. This area raises a number of complex questions relating to domestic law, the interaction between international refugee law, international human rights law, and international criminal law. He began by setting out general principles which must be borne in mind when looking at this area, before moving on to more substantive issues.

There are a number of key principles that must be noted in relation to extradition and rendition. First, while many people are unreturnable, the undesirable in this group are a very small sub-set. Additionally, although some UBUs are not protected by non-*refoulement* obligations under the 1951 Refugee Convention, they are nonetheless non-returnable under human rights treaties.

Second, protection can be removed for those who are not deemed to be unreturnable by reference to various laws and concepts:

- a) Article 1F(a) and (b) of the 1951 Refugee Convention refer to the commission of crimes that can lead to exclusion from refugee status, while Article 1F(c) refers to acts (not crimes). As a result, many countries exclude asylum seekers on the basis of 1F(c) even where the individual is not suspected of committing a crime *per se*. This may also be the case where the first limb of Article 33(2) of the 1951 Refugee Convention, is applied. This provision provides that persons who are a danger to the security of the host country may not avail themselves of protection against *refoulement* under the 1951 Refugee Convention.

- b) The second limb of 33(2) states that the Article 33(1) non-*refoulement* obligation does not apply to persons convicted of a serious crime and who constitute a danger to the community. Professor Gilbert suggested this could only be applied to expulsions if the prosecution occurred in the home country (where the serious crime took place) or in the host country under universal jurisdiction.
- c) Paragraph 7 of the 1950 UNHCR Statute has different wording in relation to persons excluded from UNHCR mandate. However, 1F postdates paragraph 7 and so 1F should be used by UNHCR when conducting RSD. This approach is also consistent with the fact that States' obligations relate to the 1951 Refugee Convention (i.e. 1F) rather than the UNHCR Statute.
- d) Professor Gilbert suggested that perhaps it was time for a different test under 1F which takes account of the two different aspects involved. Such a test could take into account the degree of participation of an individual in the commission of a crime or act rather than a simple blanket exclusion on the basis of any form of participation.

Another key principle to note is 'extraditable' does not mean 'excludable' and vice versa. They involve two different tests and so should not be confused. Professor Gilbert noted that in relation to excludability many difficult questions are raised, for example what constitutes a 'serious' non-political crime under 1F(b).

Professor Gilbert also discussed exclusion and international human rights law. As already noted, even if someone is excluded from international refugee protection, human rights may continue to act as a bar to removal. For example in the *Rwanda 5* case, which concerned the attempted extradition of a number of suspected Rwandan *genocidaires* from the UK to Rwanda to face trial, although the UK courts decided that the situation in Rwanda was sufficiently serious to trigger Article 3 of the ECHR (prohibition on torture), it did trigger Article 6 (right to a fair trial) and so the extradition request was denied.

Moving onto substantive issues, Professor Gilbert turned to extradition requests and exclusion from refugee status. First, while 'serious reasons' are necessary to exclude under 1F, the standard under extradition law can be much lower. Furthermore, Article 1A(2) of the 1951 Refugee Convention is no bar to extradition orders if the requesting country is safe (and the requesting country is not of course the country of origin). However, many extradition laws do not allow for the extradition of nationals and as some countries treat recognised refugees as nationals, this can prevent extradition. A further issue is double criminality, which can be complex but is required in some states: namely the alleged crime committed needs to be seen as a crime in both states for an extradition request to be valid.

The issue of *aut dedere, aut judicare* (the obligation of states to prosecute persons who have committed serious international crimes when there has been no extradition request from another state) is also often difficult to implement in practice. There are not many incidents of universal jurisdiction operating in practice but some countries are more willing than others to initiate proceedings on this basis. For example, Germany is happy to prosecute war crimes. The country has to be prepared to invest in the prosecution though it is an expensive process, but once you invest the first time, subsequent prosecutions become more cost effective.

To conclude, Professor Gilbert, reiterated that extradition is not the same as exclusion. Exclusion does not automatically mean an individual is extraditable. Extradition is one way to deal with undesirables but does not offer a comprehensive solution. Finally, there appears to be much more willingness on the part of states to cooperate in relation to international prosecutions for low level crimes rather than for high level ones that the home state itself wishes to prosecute.

#### **When international criminal justice concludes: undesirable but unreturnable individuals at the ICC**

*Emma Irving, University of Amsterdam, Netherlands*

Emma Irving discussed the consequences for UBUs when international criminal justice has run its course, whether at the termination of a prison sentence or after an acquittal, specifically focusing on persons charged by the International Criminal Court (ICC).

For understandable reasons, States are often reluctant to allow persons charged with international crimes on their territory, particularly if public opinion is against them. In these scenarios Ms Irving questioned what role (if any) the ICC can play in the relocating these UBUs.

Individuals tried by the International Criminal Tribunal for the Former Yugoslavia (ICTY) have generally found acceptance in their home countries, while the experience in relation to individuals tried by the International Criminal Tribunal for Rwanda (ICTR) has been very different. The change in government following the genocide has meant the reception of war criminals or those acquitted by the ICTR has been hostile and violent. For these reasons, some have been moved to safe houses in Tanzania, with restrictions placed on their liberty for periods of over 10 years. While the ICTY's activities have concluded and the ICTR is coming to end, this issue is far from over with respect to the ICC.

With this in mind, Emma Irving sees three possible approaches the ICC has at its disposal to assist the relocation of UBUs when their interaction with the criminal process comes to an end. First, through coordination and communication, the ICC can assist in finding a State that may be willing to host the individual(s) concerned: with contacts throughout the world, this would be

far easier coordinated by the ICC than left to the individual. There is the possibility that the ICC is already facilitating these kinds of agreements through 'quiet diplomacy'. Second, the ICC could adapt existing ICC protection infrastructures to aid UBUs. For example, there are a number of protection mechanisms that are set in motion to protect witnesses, such as the 'initial response system' – a hotline for people in imminent danger. Third, the ICC have sought assurances in the past from home State in relating to the protection of witnesses. This could be transposed to assist UBUs, especially if the threat comes from the home State itself.

Finally, as to whether we can apply lessons learned from exploring the ICC situation to broader contexts of unreturnability remains unclear. First, these situations are in many instances specific to the ICC, for example where people become unreturnable *because* of ICC involvement. Second, the ICC has institutional responsibilities and attributes that make it a unique actor.

### First panel discussion

It was pointed out that the cooperation of the host state is vital in the prosecution of UBUs in the universal jurisdiction setting. For example, the UK has had problems trying to prosecute many Rwandans who were involved in the genocide because the Rwandan government has refused to cooperate. However recent trends show that prosecution is more successful in situations where international tribunals have already been set up (i.e. the ICTY and the ICTR) due to the large databases, transcripts of witnesses and willingness of the State concerned to cooperate. Where home States remain uncooperative it is still possible to prosecute, for example using witnesses based outside the home country, though this has proven a harder route to follow in practice.

Turning to the issue of discretion, it was noted that most countries abide by standards of discretion in their criminal investigation procedures and a number of factors are weighed up when deciding whether to pursue prosecution. For example, the amount of evidence available, whether prosecution is in the public interest and the costs involved. For certain countries such as Canada, there are certain circumstances where they have a duty to prosecute (see Professor Gilbert's talk above). Even in these situations, however, other considerations are taken into account, for example the role the person played

in the crime i.e. most states like Canada are focused on prosecuting the most high-level/senior offenders or persons directly involved in the commission of a crime. The fact that the vast majority of the 1F population have been excluded for low level or indirect involvement may therefore be another reason not to contemplate prosecution. Ultimately, the decision as to whether or not to pursue prosecution for crimes committed abroad is discretionary, and to a large extent dependent on financial, time and resource constraints.

It was suggested that some States may, in certain situations, see it as political advantageous to accommodate a UBU. However this seems unlikely and in relation to numbers we are talking about tens of people rather than hundreds or thousands. Nevertheless, empirical evidence suggests that around one per cent of asylum claimants could end up in the exclusion stream; if this is correct it could have a profound effect on countries hosting large numbers of asylum seekers, e.g. within the context of the current refugee crisis in Europe.

As was seen with Emma Irving's presentation, prosecution does not solve the issue of housing UBUs permanently. Once a person has been convicted, served his or her time and released there is still the question of where they should, or indeed can, reside.

The first ever person to be released after serving a sentence having been convicted by the ICC was discussed. Interestingly and rather unusually, just before his release Germain Katanga was transferred by the ICC in December 2015 to the DRC (his home country) to serve the rest of his sentence there. This had never been done before, and it looks like he will face new domestic criminal charges when his ICC sentence is completed.

Finally, the discussion turned to extradition. First, it was noted that there are many ways extraditions treaties are monitored. Two of the clearest ways are through the individuals involved (by challenging the process) and the extraditing State. History has predominantly shown that States respect extradition treaties (for example, they only prosecute the crime on which the extradition request was based, even if there might be separate further grounds on which an individual may be charged). Second, there are situations when a third country (i.e. not the host country or the country of origin) may wish to extradite a UBU. This can occur when a crime has been committed in a transit country or when travelling.

## Session 2: Other measures for addressing UBUs

### Deporting undesirable migrants: diplomatic assurances and the challenge of human rights

*Dr Mariagiulia Giuffr , Edge Hill University, UK*

Dr Giuffr  used human rights case law to outline instances in which States have attempted to deport UBUs to countries that fall foul of the principle of non-*refoulement*<sup>1</sup> through the use of diplomatic assurances (DAs). The scope of the talk was restricted to (i) refugees whose refugee status has been denied under 1F (1F-excluded persons); and (ii) people who, falling foul of Article 33(2) of the 1951 Convention, are not granted the benefit of non-*refoulement* under Article 33(1) despite being recognised as refugees.

DAs are undertakings by receiving States that a deportee will be treated in a particular manner, as a way of facilitating the transference of people who have been left in legal limbo because the host state finds them undesirable but are deemed unreturnable due to human rights concerns in the receiving State. While DAs are not explicitly mentioned in international human rights treaties, they have become a popular tool used to remove individuals who are perceived as a threat to the national security of the host State.

While in principle DAs can be used to ensure compliance with States' non-*refoulement* obligations, recent cases have shown that in practice DAs have not removed the real risk of torture and ill treatment in the receiving country. For example, the European Court of Human Rights (ECtHR) has found a violation of Article 3 (prohibition on torture) of the ECHR had occurred in several cases where DAs were agreed between the receiving and sending State.

DAs can take various forms, ranging from an exchange of letters to more complex agreements such as the UK's approach of requesting receiving states sign a Memorandum of Understanding (MoU). These MoUs set out in writing a list of assurances concerning the humane treatment to be given to the returnee by the receiving State. In the case of *Abu Qatada v UK*, the UK government tried to send a suspected terrorist back to Jordan through the signing of a MoU. The ECtHR however found that, despite the existence of the MoU, Abu Qatada would still be at risk of a violation of Article 6 (right to a fair trial) if returned to Jordan to stand trial there. This was particularly in relation to the risk that evidence obtained by torture would be used in such a trial. The ECtHR concluded that torture in Jordan remains widespread and routine and is practiced with impunity. Nevertheless, relying on strong political relations between the two countries, the ECtHR viewed the MoU specific and comprehensive enough to remove any real risk of ill treatment contrary to Article 3 of the ECHR. Eventually the two countries

signed a new 'mutual legal assistance agreement' which was entered into in June 2013 which contained a number of fair trial guarantees for deportees.

Attempts by the UK Government to use MoUs to assist with the removal of Abu Qatada should be seen in the context of a State trying to remove all foreign born terror suspects from its territory due to a highly charged political climate surrounding this issue. Even though Abu Qatada was ultimately acquitted of the charges he faced in Jordan evidence obtained by torture was relied upon in his trial (although not considered sufficient grounds for a conviction by the Jordanian court).

Are DAs therefore a valuable tool in addressing the problem of UBUs? They may help establish human rights standards in relation to specific persons on an ad hoc basis, but it is difficult to generalise and DAs should be considered on a case-by-case basis. However, it is hard to envisage them ever being completely effective in preventing torture and ill-treatment, because by its very nature, torture is often administered in secret. Furthermore, the very fact a State has entered into a DA with a receiving State indicates the receiving State has a poor human rights record. As such, with assurances should be treated with caution. On a normative level, how can you guarantee humane treatment for one person when torture is widely practiced in the State?

### Removal, voluntary return and relocation: a case study of 1F excluded individuals in the Netherlands

*Dr Joris van Wijk, VU University Amsterdam, Netherlands*

Dr van Wijk looked at the experiences and challenges involved in removing 1F-excluded individuals, with particular focus on the practice of the Netherlands. Dr van Wijk discussed: i) the forced removal of long-term UBUs; ii) promoting voluntary return to the country of origin; and iii) promoting relocation to third countries.

The Netherlands, together with Canada, is very active in applying 1F exclusions. The Netherlands considers exclusion issues before inclusion during refugee status determination, which means persons are assessed under 1F of the 1951 Refugee Convention before they have even been assessed for refugee status (see James Simeon's critique of this approach below). If a person is considered to fall within the scope of either 1F (a), (b) or (c), their asylum application is immediately rejected. As a result, rates of exclusion in the Netherlands are higher than most other countries.

In the Netherlands, removal is the norm for 1F-excluded persons unless the person is unreturnable. If there is a bar on removal, such as ill-treatment concerns in the country of origin, this is assessed every six months to ascertain whether the situation in the home state has altered. In cases where the individual cannot return to his country of residence because

<sup>1</sup> As set out in the 1951 Refugee Convention and international human rights treaties: Article 3 of the Convention against Torture (CAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and Article 3 of the European Convention on Human Rights (ECHR)



Article 3 ECHR applies, the obligation to leave the Netherlands still rests on the 1F-excluded person.

Unreturnability is seen as temporary in nature by the State but UBUs are not given temporary status. In practice the situation for UBUs in the Netherlands is far from temporary, and many are left in a legal and status 'limbo' for indefinite periods of time.

Interestingly, public opinion in the Netherlands is very much on the side of the 1F-excluded individual over the State. The public tend to see these individuals as victims of the system and favours them remaining in the Netherlands rather than be subject to removal proceedings. For example, a wave of national sympathy attached to the case of an Afghan man who was threatened with deportation having lived in the Netherlands for 15 years with his family; even the local mayor pushed for him to be allowed to remain.

The Netherlands actively encourages 1F-excluded persons who cannot return because of the application of Article 3 ECHR to voluntarily relocate to a third country. Every 6 months the reparation and return service contacts the 1F-excluded person to talk about the progress of leaving the Netherlands to a third country if they cannot return to their country of origin. Voluntary return of 1F-excluded persons is, however, not actively facilitated by the government. Even if 1F-excluded persons want to return voluntarily, they are e.g. excluded from making use of reintegration packages .

In regards to relocation and resettlement, Dr van Wijk noted that institutional arrangements are non-existent in the Netherlands and so must be self-arranged by the UBU. This leads to two different types of scenarios, one formal and one informal. First, individuals can adopt a legal approach such as applying for a visa. Second, the individual can attempt to cross into a third country without a status and live there illegally. An interesting development in the European context is the so-called 'Europe Route'. This is where spouses of UBUs move to another country in Europe and obtain a residence permit, under EU law they

can after a certain period of time then apply for reunification and bring their UBU spouse to join them. Due to minimal information exchange between States, this has proven quite a successful way by which UBUs can regularise their stay in Europe.

Finally, Dr van Wijk noted that the numbers of persons in this form of limbo are currently low. However, the nature of the problem means it is a compelling topic – the persons affected are on a vast sliding scale ranging from persons who committed crimes 20 years ago to people currently active in criminal and terrorist activities. Additionally, the European Route is an interesting individual solution to obtaining legal status, though hardly a solution States would agree on.

### **Second panel discussion**

It was noted that like the Netherlands, in the UK there are pro-migration sections of the population who fight against the expulsion of UBUs. However it was suggested that often the public are not aware of all the facts surrounding these cases. Additionally, deportations with assurances in the UK setting are expensive and only carried out in exceptional scenarios.

The discussion then focused on existing mechanisms for monitoring diplomatic assurances. While they are essentially political agreements and so have to be analysed on a case-by-case basis, a number of potential external monitoring mechanisms exist. First, domestic and international human rights bodies and NGOs have a role in monitoring the situation in the receiving state (for example by visiting jails and detention facilities). Also the individuals involved can lodge a complaint to a human rights body assuming the country has ratified the relevant treaties (although in reality the receiving state often is not party to international treaties such as CAT). Finally there is the question of state responsibility, where a state may report another for non-compliance in relation to an agreement, which could lead to reparation and restitution (depending on the terms of the agreement and jurisdiction).

## Session 3: Practice in the European Union, civil law jurisdictions I

### New exceptions to the principle of non-*refoulement*: the German case

*Dr Burcu Toğral Koca, Eskişehir Osmangazi University, Turkey*

Session three moved from thematic issues to individual country reports, starting with Dr Koca who looked at the situation in Germany through a security lens. The securitisation of migration was in place in the EU context before the terrorist attacks of 11 September 2001 on the United States. For example, since the introduction of the Schengen Zone in the mid-1980s, Europe has adopted a selective securitization approach focused on asylum seekers, economic migrants and unwanted migrants. However, following the 9/11 attacks terrorism became the main discourse in relation to all forms of migration in Germany. Two security packages and a new immigration law were swiftly passed with little discussion or debate in the German parliament. The asylum procedure was also changed and has become more restrictive, with a focus on preventing terrorism and discouraging potential terrorists from seeking asylum.

In relation to the deportation of migrants, there is now a trend of applying administrative measures over criminal law, which results in less protection for the deportee while making it easier for the State to remove the individual. In addition, the use of discretionary expulsions which have been used by Germany to invoke the immediate removal of persons such as 'hate preachers' is another worrying trend. A deportation order authorized by the German Supreme Court has no notice attached to it, has immediate effect and the affected person is banned from re-entering the country.

Migrants who are non-returnable are usually given a 'toleration status' – a so-called *duldung*. This status gives them leave to stay but often has many restrictions attached relating to areas such as freedom of movement (restricted to live in specific regions) and the right to work. This form of temporary status is also continually reviewed by the State.

With terrorism seen more and more as a social construct being manipulated by States, Dr Koca suggests that special protection is needed for certain UBUs. Furthermore, the application of a proportionality test, with the opportunity of a regular legal status for UBUs who find themselves in these prolonged states of legal limbo, would go a long way to reducing the scale of the issue.

### Undesirable and unreturnable migrants under French law: between legal uncertainty and legal vacuum

*Chloé Peyronnet, Université Jean Moulin Lyon 3, France*

Chloé Peyronnet introduced the issue of UBUs in the context of France by noting that, while undesirable persons can be expelled from the country if they are deemed to be a threat to public policy, the term undesirable is undefined in French domestic law. As such, she argued that responses to UBUs in

France are not consistent with the rule of law due to the wide discretion given to the State. Furthermore, the scale of the issue in France is difficult to gauge as official data only report the total number of removals and leaves out the reason for the removal (i.e. legal status, security threat, etc).

The general principle in France is that non-nationals can be deported if they represent a threat to public policy. There are however three exceptions to this principle. First, minors enjoy 'absolute protection' (at least theoretically) against expulsion (Article L-521-4 of the Aliens Code). Second, when undesirables cannot be deported because they face a risk of persecution, they receive 'quasi-absolute' protection against expulsion (Article L. 513-2 of the Aliens Code). Finally, a specific category of persons receive 'relative protection' against expulsion (Articles L. 521-1 to L. 521-5 of the Aliens Code), for example if they meet a set of criteria that proves deportation would cause a disproportionate interference with their right to private or family life (Article 8 ECHR). In addition to those who receive quasi-absolute or relative protection against deportation, practical obstacles can also mean the authorities cannot enforce an expulsion measure against a number of individuals.

France responds to these differing forms of UBUs in two ways: detention or home custody. Detention is used as a first choice, suggesting the graver punishment is the preferred choice. However, home custody itself is not a lenient measure – there is no definite end to this form of detention and it falls outside the scope of Article 5 of ECHR (prohibition on arbitrary detention) and the time limits implied by this human rights guarantee (see *inter alia* ECtHR *Enhorn* ruling). Furthermore, as communities are often unhappy with UBUs staying in their area, individuals subject to home custody are often moved around the country.

The home custody response to UBUs in France intertwines administrative law with criminal law. Undesirables who cannot be removed for protection reasons (i.e. they enjoy a quasi- or absolute protection against deportation) can avoid detention if they fulfill two criteria: (i) prove they would face a risk of persecution if returned to their state of origin; and (ii) show they are unable to move to another State (Articles L. 523-3 and L. 561-1 of the Aliens Code). While home custody is an administrative measure, a violation of the requirements of home custody is a criminal offence and can result in fines or imprisonment. Moreover, as in every other European country, being an irregular migrant is a criminal offence in France. As a result, irregular migrants that cannot be deported through the administrative processes can easily be imprisoned, and then be considered a threat to public policy on the primary ground that they have been in jail and finally become UBUs.

In the case of undesirables who are unable to be removed due to practical issues, the general principle is they should be detained. These UBUs can be granted home custody if they give assurances they will not breach the restrictions imposed by the measure. Again if the home custody conditions are breached, a prison sentence is the punishment. These forms of 'remedies' may last indefinitely – or until the person becomes 'removable'.



Chloé Peyronnet concluded her talk by making the salient point that the situation in France currently has to be understood within the context of the two terrorist attacks that occurred during 2015, to which the government reacted with extremely heavy-handed security measures. As a result of the attacks the system is changing rapidly. Migrants are presented as irregular migrants, and irregular migrants are presented as a threat to public policy. An example of the current political climate is the draft amendment to the French Constitution called 'Protection of the Nation' that provided the possibility of deprivation of French nationality for binational French-born citizens convicted of terrorist offences or other serious crimes – the aim being to circumvent the impossibility to deport French citizens. This has caused outrage among many politicians and academics since it was proposed. As Ms Peyronnet noted, it was unclear how in practice this would have worked when France, like so many countries, faces a great number of obstacles even trying to expel foreign nationals (i.e. UBUs). In the meantime, the president of the Republic announced the removal of the draft amendment, stating: "I decided to close the constitutional debate". It remains to be seen how the situation will evolve in France.

#### **Non-removable migrants suspected or convicted of serious crimes in the Netherlands**

*Maarten Bolhuis, VU University Amsterdam, Netherlands*

Maarten Bolhuis started his presentation by noting that asylum seekers are deemed undesirable in the Netherlands if they fall into one of three categories, namely, those the Netherlands has serious reasons to believe have committed a serious crime before entering the Netherlands; those that have committed a crime after arriving in the Netherlands; and those who are deemed to be a threat to national security. These persons become unreturnable usually by virtue of Article 3 of the ECHR, but other reasons such as medical grounds, interim measures of the ECtHR, and practical reasons (statelessness, lack of documents, etc) can all create a bar to removal.

UBUs are served with an order to leave the Netherlands within 28 days and are given an entry ban (for up to 20 years) or declaration of being a *persona non grata*. Non-compliance with these measures is a criminal offence. Where a person is non-returnable they are therefore left in legal limbo with no access to a residence permit or leave to remain in the Netherlands, with no social allowance and only access to a minimal level of services such as legal aid and primary emergency health care.

While there are no official figures for persons given a removal order in consequence of committing crimes after they have been granted refugee status, there is data on 1F exclusions. Between 1992 and 2014 there were 920 persons denied refugee status for reasons based on 1F(a), (b) or (c). This includes Afghanistan, Iraqi, Turkish and Angolan nationals, most of whom were excluded under 1F(a) for the suspected commission of war

crimes or crimes against humanity. For certain nationalities there is a policy of categorical exclusion, meaning that merely holding a certain position within a designated organization suffices as a basis for exclusion. For example, a large number of Afghan asylum seekers have been excluded because they severed in the Khad/WAD security service.

Turning to the question of unreturnability, between 2008 and 2014 about 30 per cent of all 1F-excluded persons (180 of 630 cases) were deemed unreturnable due to Article 3 ECHR concerns. The number of unreturnables are therefore not insignificant, which has left the Netherlands (along with many other countries) in a dilemma as to what to do with these people.

Policies to deal with UBUs in the Netherlands have varied. Principally, the State encourages UBUs to leave. Furthermore as already stated, 1F-excluded individuals have no legal right to remain on Dutch territory and so there is no legal route to obtaining a form of residence permit. There are however two *ad hoc* policy measures that have the potential to lift the applicability of Article 1F. First there is a 'durability and proportionality' test: if a person has been a UBU for a number of years, they can apply for revocation of the application of Article 1F. The durability limb of this test requires the person to have been without residence for 10 years, with no prospect of change in relation to the Article 3 ECHR bar to removal and that departure to a third country is not possible. The second limb of the test (proportionality) is judged on whether the alien has made plausible that there are highly exceptional circumstances which mean that permanently refraining from granting him a residence permit is disproportionate. 'Exceptional circumstances' include issues such as a medical or humanitarian emergency affecting the individual's family life.

Under the second *ad hoc* measure, the Minister of Security and Justice can grant a temporary residence permit to an individual who has been refused residence, through a discretionary power under Article 3(4)(3) of the Aliens Decree. While this power is broader than the durability and proportionality test outlined previously, it is only applied in unique situations, which amount to 'harrowing' situations.

In practice these measures have not been used with any degree of frequency. The durability and proportionality test has led to residence permits in a very limited number of cases (10 cases as of April 2014) as both the durability and proportionality limbs have proven very high thresholds to meet. In relation to the Minister of Security and Justice's power to grant temporary residence permits, figures are not known.

Finally, there have been few attempts to prosecute UBUs, while extraditions or transfers to third countries have been attempted with mixed results. For example, the Netherlands has invested heavily in the judicial system in Rwanda to ease extradition procedures. Nonetheless the Dutch courts are still reluctant to extradite individuals to Rwanda.

To conclude, Maarten Bolhuis noted that due to the large number of 1F-excluded persons who cannot be *refouled* and with the few remedies that are available seldom used, many UBUs in the Netherlands are left in limbo: a situation which may last for 20 years or more.

### Third panel discussion

The discussions began by looking into the current approach taken by France. While France has applied the EU Returns Directive to some degree, under national French law detention is still the preference when dealing with undesirable migrants if expulsion is not an option. Electronic surveillance has also been used, but sparingly. The courts in France have defined who can be given an expulsion measure or a ban from the territory so widely that it creates serious issues regarding the principles of legal certainty and of the rule of law.

Discussions then turned to the UK situation. It was noted that exclusion under 1F is not only applied to suspected terrorists but also small to medium scale criminals. The UK has created tough measures for these people even though they are unreturnable. The question of whether these people should be rehabilitated rather than simply detaining them awaiting removal was also raised, though it is unlikely the UK will seriously pursue this option in relation to 1F-excluded persons.

The 'legal limbo' faced by UBUs in the Netherlands and France is also present in the UK, although in comparison to the Netherlands the numbers of these persons are much lower. Perhaps it is time to consider cut-off points, for example, for people who committed crimes 40 years ago yet still live in limbo. In *AH v Secretary of State*, the passage of time since the alleged commission of a crime was potentially seen as a relevant factor in deciding the seriousness of the crime under 1F(b). That case has now been appealed to the Supreme Court.

It was also pointed out that persons who are unidentifiable are perhaps not covered by the current definitions of UBUs. Particularly in the case of persons suffering mental health issues, there are times when it is impossible to identify them.

These issues are discussed further below when discussions turned to the UK country situation.

Turning to the issue of serious and less serious crimes or acts under 1F, it was suggested that there is a clear balancing act that needs to be clarified at the national level. Jurisprudence around the world on this issue is muddled at best. One approach could be to use the definition of serious crime as set out in the Rome Statute of the ICC (although that definition was never meant to be prescriptive). It is however possible that States do not want to address these issues (i.e. the vagueness is deliberate), as it may create new issues and problems when seeking to exclude individuals under 1F and the consequent State measures adopted thereafter.

The discussion then turned to discuss the Netherlands country situation in more detail. It was noted that the 'entry ban' in the Netherlands came into the force at the same time as the EU Returns Directive. It can be imposed when a person has no legal right to remain and has to leave the country or has not left within the designated period. The ban, though usually of a duration of five years, can be extended to 20 years under the Aliens Act by a responsible minister if it is considered that the person poses a serious threat to public order or national security (this is classed as a 'heavy' entry ban).

The risk of further criminality perpetrated by 1F-excluded persons was acknowledged. However if this is seen in the context of particular populations in Europe the danger posed by these individuals is small. In the Netherlands, Afghan 1F-excluded persons live with and are supported by their family and generally wish to avoid all contact with the State for fear of future problems relating to their irregular status. It was suggested that the risk of future criminality was a major driver behind the push for the restrictive leave policy in the UK, as it was an attempt to avoid driving people underground. Similar to the experience in the Netherlands, when public funds were removed from supporting 1F-excluded persons in the UK there was no backlash as they relied on the support of their families. However, it is still possible to access some public funds if the case for destitution can be made.

## Session 4: Practice of European States, civil law jurisdictions II

### The situation of undesirable/unreturnable migrants in Norway

*Professor Terje Einarsen, University of Bergen, Norway and Mi Hanne Christiansen, Norwegian Directorate of Immigration*

In Norway unreturnables fit into two categories, persons who are prevented from being returned for legal reasons and persons who are prevented from being returned for practical reasons. Unlike the Netherlands however, Norway includes before excludes, meaning asylum seekers are assessed for refugee status inclusion before they are assessed under Article 1F for exclusion. Currently there are 118 persons in Norway who have been excluded under Article 1F but have a bar on return to their home states for legal reasons. These persons are either given a limited-stay permit or no permit at all. The number of Article 1F UBUs has increased in recent times by about 10 per year. These individuals can be given a permit for very limited periods (renewal every seven months is common, which involves an application process each time) as a means of the government keeping track of them. While these individuals are excluded from ever applying for a permanent permit or citizenship, if they arrive with family members the family members can apply for asylum in their own right (although the person cannot request family reunification if family members are abroad). There is a small number who receive no permit at all and these are seen as serious security risk cases.

Since new legislation was adopted in 2008, UBUs who have remained in Norway for a specific length of time can now apply for leave to stay on humanitarian grounds, although this has not yet been exercised in practice.

Two elements of the UBU situation were then discussed in more detail. First, in relation to undesirability, the experience in Norway is that just because a person is excluded under 1F does not mean they will cause problems or issues for the State. The majority of people live perfectly quiet lives.

In relation to data, of all the asylum seekers or refugees in Norway, about two per cent of that population go on to commit crimes in Norway, which for Norway is a significant number. Of the 100 persons who have been excluded under 1F, five (5 per cent) were persons who committed crimes after they arrived (mainly drugs or violence related offences).

Moving onto the unreturnable element, since the beginning of the current refugee crisis new measures have been put in place, which have had the knock-on effect of creating more people who are now deemed to be unreturnable. For example, until recently everyone granted protection was considered to be a refugee, but Norway is now introducing limited permits for Article 3 ECHR-type protection, which limits the status granted to individuals and appears to be a form of subsidiary protection as exists under the EU Qualification Directive. The presentation concluded by noting a great deal of things will be happening in relation to UBUs in the near future and it remains to be seen how the situation will develop.

### Undesirable and unreturnable: a case study of Italy

*Dr Marco Odello, Aberystwyth University, UK*

Dr Odello discussed the issue of UBUs in the context of Italy, focusing on persons who have been 1F-excluded. He started by observing the lack of published cases in Italy, although whether this means the issue is small or simply not being made public is unclear.

Using information obtained from the Refugee Council in Italy, Dr Odello noted that there were 79,000 applications in 2015 for refugee status in Italy. Of that number, five per cent received refugee status, 15 per cent subsidiary protection and 22 per cent humanitarian protection. This however leaves a missing or ignored 16 per cent and it remains unclear what has happened to these applicants.

There is a criminalisation of migration policy in Italy, with reactions of the press and public informing government policy. This securitisation approach has increased in intensity since the 2000s, when people started to come through Italy in larger numbers, using Italy as a transit country in the hope of settling in Northern Europe.

Dr Odello discussed the legal framework in Italy before looking at expulsion in more detail. The Italian authorities use a combination of the Criminal Code and Immigration law to remove people from the territory. Article 10 of the Italian Constitution defines asylum broadly, yet there is no specific law in relation to the asylum process. The last attempted proposal to incorporate the Article 10 into immigration law was made in 2001 but did not reach the final stages of approval in Parliament. However, in practice high courts in Italy have used Article 10 of the Constitution as a basis for considering asylum claims.

The Immigration laws (1990 and 1998) both attempted to organise ways of dealing with different groups of immigrants, with varying degrees of success. In 2002 further legal changes tightened access to immigration status and procedures and increased the criminalisation of people entering the country. These new laws were challenged in 2007 before the Constitutional Court, but the Court held the law does not violate the Constitution (for example detention of two to four years if people ignore expulsion orders).

Turning to expulsions, there are two main types under Italian law, (i) Administrative Expulsion – through a representative of the government at the local level; and (ii) Judicial Expulsion – through an order made by a judge. There is a long list of activities that may lead to expulsion – most recently crimes against democratic organizations inside or outside Italy have been added.

Prohibition of expulsion in Italian law comes from the Migration Law 1998, which has similar clauses to the 1951 Refugee Convention in relation to non-*refoulement*. In these cases, the authorities usually issue a residence permit for humanitarian

reasons. Expulsion can also be stopped for other reasons such as the presence of family members in Italy or if the expellee is pregnant or within six months of giving birth.

Dr Odello then highlighted some important cases in relation to Italy and UBUs. First, in the famous case of Öcalan, a Turkish man who founded the Kurdish Workers Party (PKK) found himself in Italy after moving through several countries. He gave himself up to police in Italy. Although he had a number of arrest warrants against him in countries including Turkey and West Germany, Italy could not extradite Öcalan to Turkey as the death penalty was still in place, and Germany for internal political reasons did not request extradition. Eventually Italy convinced Öcalan to leave the country 'spontaneously' and he flew to Kenya, where Turkish intelligence picked him up. Italy here sought to subvert its non-*refoulement* obligations. Additionally, Italy has been found in breach of Article 3 and Article 34 of the ECHR in separate cases when (i) returning a Tunisian citizen back to Tunisia to face inhumane and degrading treatment (the *Saadi* case) and (ii) the expulsion of another Tunisian while a decision by the ECtHR on his case was pending (*Ben Khemais*).

Dr Odello concluded by noting that while data was patchy, Italy showed a trend towards expanding the definition of undesirables and the practice of expulsion. For example, new provisions now allow local authorities to expel undesirable migrants. There are also problems with the ability of individuals to appeal expulsion decisions and inconsistencies in how the matter is dealt with between the administrative and judicial courts, resulting in conflicting outputs being generated.

### **The indefinite detention of undesirable and unreturnable third country nationals in Greece**

*Dr Eleni Koutsouraki, Panteion University, Greece*

As the current refugee crisis continues unabated, it was particularly pertinent to hear from Dr Koutsouraki on how Greece is responding to this issue of UBUs. In Greece, undesirables are those who are considered dangerous to national security and public order (although in the current climate it appears any undocumented persons not in need of international protection are considered to be undesirable). As seen with other countries, UBUs are broken down into two groups, those who cannot be returned because they need international protection and those who cannot be returned for practical reasons.

Similar to other country reports, Dr Koutsouraki noted problems with obtaining up-to-date data, with the Greek authorities stating it is impossible to estimate the total number of UBUs in Greece as the different computer systems used in the regional Directorates of the Hellenic Police are not connected to a central database.

The legal framework of detention in Greece is more or less a replication of the EU Return Directive. There is however an

added ground on those who are considered to pose a danger to national security which amounts to a violation of EU Law. However in light of events over the last year, such as the election of a new government, this could change.

There are a number of problems with the current legal framework relating to UBUs. First, there is the possibility that unreturnables could remain in detention indefinitely, for example in cases of non-cooperation with 'voluntary' return. In 2014, the Greek police issued decisions of 'mandatory residence' in detention centres for those third country nationals who had not been returned within 18 months. While the new government has striven to eliminate this approach, a Ministerial Decision allowing for administrative detention beyond 18 months is still currently valid.

Second, all third country nationals who do not have a legal permit to remain in Greece are subject to administrative detention without an individual assessment of their case. Currently, detention is used for those apprehended at the border with Turkey as well as in the territory but not in the Greek Islands, although this might change soon.

Third, detention centres are used excessively for persons who are deemed to be a danger to public order or national security. The police authorities have been resorting to 'legitimizing reasons' for detaining persons, which means using prior prosecutions or earlier custodial sentences as justification for detention. In fact the Greek Ombudsman has noted there is a great deal of confusion among police as to the categorisation of aliens and the legal systems these different groups fall within.

Fourth, another indicator as to how detention has become an objective of the Greek authorities was the issuing of detention orders on the grounds of 'dangerosity' to third country nationals arrested in 'drug trafficking areas' during 2014, without consideration of other factors. Alarming, the Greek Ombudsman noted that this appeared to be directed at persons with specific ethnic characteristics who were also unreturnable.

Fifth, if a detainee wishes to make a legal challenge to their detention before the administrative courts, it is considered by the President of the court rather than by court composition. With no right to appeal and no legal aid available it is unsurprising that the ECtHR has viewed this as an ineffective remedy.

Dr Koutsouraki ended her discussion by looking at potential solutions to the issues raised. First and foremost there is an urgent need for better data collection in order to estimate the true scale of the problem. It is also clear that the implementation of administrative detention provisions concerning UBUs is unlawful and so new internal regulations are needed to be used by the police. Furthermore there is also a need for an effective legal remedy. Genuine voluntary returns, review of detention and alternatives to detention should all be considered. For

example, Greece could apply projects similar to the UK's 'Community Support Project' and also issue residence permits for tolerated stay.

Finally it should not be forgotten that Greece, as a 'gateway' to Europe, needs to be viewed in the context of the larger context of Europe's inability to manage mixed migration flows.

#### Fourth panel discussion

The discussions began with a debate surrounding who we see as UBUs and how this affects our discussion of State responses. It was suggested that throughout the day the grounds for defining persons as 'undesirable' has become broader, resulting in a need to look again at the group of people currently being defined as UBUs. However solutions become incredibly complex if you include all such groups. It was also suggested that it is best to focus discussions on persons who have committed serious crimes. Finally, while in legal terms there are clear distinctions between 1F-excluded persons and persons who commit crimes when in the host country, in practice if a person is unreturnable there is not a great difference between these groups of people, as the end result is the same.

The discussion then turned to the individual states discussed by the panel. The approach of Norway whereby UBUs can gain even a limited status is in stark contrast to some countries in the EU, particularly in comparison to Greece where all aliens are currently seen as undesirable (on a practical level there is simply not the capacity to assist aliens with social benefits). Greece also has great problems returning persons due to a lack of cooperation among other States and in its current plight Greece is not in a strong position to broker bilateral agreements.

In Italy the use of both administrative procedures and criminal and civil procedures creates confusion and revisions of

decisions. Furthermore, administrative expulsions for public security reasons in Italy are carried out without a trial. The response in Italy was also discussed in the context of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders). It was suggested that Frontex are now intercepting persons at the Italian border and deciding on the spot whether the person should be entered into the asylum system – i.e. be allowed to apply for refugee status or turned back. Some are turned away purely on nationality, due to bilateral agreements signed with the home State. This approach is not being replicated in Greece although it can be difficult to gain access to the asylum system in practice. Many Tunisian, Algerian and Moroccan nationals are picked up on the islands and sent to detention centres for removal but can apply for asylum once they are in detention. Somewhat ironically it is actually easier to apply for asylum in Greece once you have been detained.

Looking specifically at expulsions, in the US expulsions are used for relatively minor crimes (such as drug possession) and employed even where people who have permanent residence. Therefore by comparison to the European cases presented today, the US approach seems extreme. Professor Rebecca Sharpless will discuss this further below.

Discussions concluded with the organisers noting some key questions that the discussions had raised and could be addressed on day two:

- The scope of the project: undesirable and unreturnables may be part of a broader group of immigrants that are in legal limbo. Is it therefore important to broaden the scope and have more defined categories?
- Is there an endpoint or backstop to temporary permits/stays? Is there the potential for one? Is there a limit to the number of times temporary permits can be renewed?



## Day Two

Day two began by reviewing the discussions, questions and thematic issues raised during the opening day's talks. These included:

- i) How broad is the scope of this conference? Is there something specific about UBUs as defined on the first day, or are we actually talking about the broader issue of unreturnable migrants in general? If we decide that we are not talking about unreturnability in general, then what makes the selected groups of persons accused of crimes so special? And what type of criminality are we talking about, only 'serious' criminality or any form of criminality? Are we in particular talking about persons excluded on the basis of Article 1F of the 1951 Refugee Convention or also other groups?
- ii) What are we talking about in terms of responses? Discussions on day one focused on deportation, prosecution, extradition, diplomatic assurances and house arrests. Are we talking here about policy responses or (harmonized) policy solutions, or a mix of both?
- iii) The issue of the temporality of current solutions. A great deal of the State responses discussed have, in practice, a very short-term focus. While sometimes this is needed, is there also a need to consider solutions and responses in the medium-term and long-term?

## Session 5: Approaches in common law jurisdictions (UK/Australia)

### Country report: Australia

*Professor Satvinder Juss, King's College London, UK*

Professor Juss began the first session by looking at the country situation in Australia in relation to UBUs. He noted that case law makes it difficult to distinguish undesirable and unreturnable migrants in terms of 1F-excluded persons, stateless people and terrorism suspects.

First, he looked at the case of *Al-Kateb v Godwin*, which involved a Palestinian man who was refused a visa but could not be removed as he was stateless. He was placed in a migration detention centre and the High Court controversially stated that under the Migration Act he could be held indefinitely.

The cases of *M47* and *M76*, while not resolving the issue of indefinite detention, both stated that detention is acceptable for the length of administrative processes associated with determining whether an asylum seeker should be granted status or removed. The Migration Amendment Bill 2013 addressed issues raised in the cases of *M47* and *M76* in relation to inconsistencies and suggested an independent review process should be implemented.

Both *MMM et al.* and *FKAG et al.* involved the unilateral application of the exclusion clauses and indefinite detention based on a 'security assessment'. Decisions relating to security in Australia therefore appear to overrule decisions on refugee status. Between January 2010 and 2012, the Australian Security and Intelligence Organisation (ASIO) issued over 50 Adverse Security Assessments on mainly Tamil asylum seekers who arrived via boat. All were found to have a well-founded fear of persecution under the 1951 Refugee Convention, none were excluded under 1F, yet all have been held in indefinite detention, often without access to legal remedies.

In practice, even if persons are recognised by the authorities as refugees, they still have to be assessed within an ASIO framework to determine whether they will be granted a legal status. The framework involves a risk assessment to determine if the person is a risk to national security. The standard of proof is much lower than that used for 1F exclusion under the Refugee Convention.

There are many issues with these practices: (i) inefficient reasoning given for the decision to detain; (ii) most of the people fleeing Sri Lanka are low level in the LTTE organisation. While one may assume the government has found a link between the alleged roles of the individuals negatively assessed and the threat they pose to Australia, this is actually unknown. Furthermore, UNHCR noted that the Australian government should be careful that they are not detaining low-level members; (iii) the decisions appear to be a form of group-based decision on boat people from Sri Lanka; (iv) there is also a political limb to this approach, namely punishing unlawful arrivals to Australia; and (v) the UN Human Rights Committee found that these forms of arbitrary detention in Australia are contrary to international law as detention has to be proportional.

Have there been any improvements? In 2012, the periodic independent review of ASIO's adverse security assessments of refugees was commissioned. While there has been some improvement since this time, decisions are still not reviewable and so are ultimately beyond the rule of law.

In January 2015, a group of refugees who had received negative security assessments saw their decisions reversed by ASIO and were released. Some had been in detention for more than five years without being charged with a crime. However, a lack of transparency still prevails. In his concluding remarks, Professor Juss noted that a key issue today in Australia is that international human rights law has not been incorporated into domestic law.

## Undesirable and unreturnable in the United Kingdom

*Dr Sarah Singer, Refugee Law Initiative, University of London, UK*

The issue of UBUs is very high on the political and media agenda in the UK. However, it is very difficult to obtain data on these people, and Freedom of Information requests may be refused by the Home Office.

Dr Singer outlined the issues surrounding the two types of undesirables in the UK (Foreign National Offenders (FNOs) and 1F-excluded persons). Taking FNOs first, namely those who have been convicted and sentenced to a term of imprisonment in the UK, this group amounts to around 13/14 per cent of the UK prison population. The primary policy in relation to FNOs is removal at the earliest opportunity. In the year 2014-15 5,591 were removed. The figures have broadly remained similar since 2008. All forms of criminality can trigger removal proceedings (even petty criminals).

Notwithstanding a considerable increase in the number of staff in the Home Office that deal with removals (and the amount of money spent on this issue, which is estimated to be £800 million in 2013–14), the rate of removals has not significantly increased.

The problems the UK faces in seeking to remove UBUs are similar to those faced by other countries discussed at this conference. They range from restrictions imposed by Article 3 and 8 of the ECHR, EU law, specific restrictions on extradition, obtaining travel documents, cooperation from foreign governments, to administrative problems within the Department itself.

The UK government has attempted to overcome these problems with a variety of approaches: i) attempting to modify the ECtHR approach to Article 3; ii) entering into MoUs with third countries such as Ethiopia, Jordan and Lebanon; and iii) altering the domestic interpretation of Article 8 (private and family life) through Immigration Rules and later through primary legislation. In 2014, new legislation set out the 'correct' interpretation of Article 8, stating that removal of FNOs is in the public interest and effectively set out a sliding scale by which the more serious the crime, the more removal of the individual is in the public interest; and (iv) the 'deport now, appeal later' approach, which means that deportees are only allowed to appeal once they have been deported to their home state (though there are exceptions in respect of serious risk of harm if removed).

In relation to administrative problems, it seems that many cases of unreturnability stem from issues related to Emergency Travel Documents (ETD), which are needed from the relevant home state or third state embassy. Recent reports have shown that thousands of ETDs have been issued by embassies but then ignored by the Home Office. Since 2013 a cross-department action plan is in place and things have begun to improve.

Current figures suggest there are currently 5,500 FNOs left in the UK whom the government is trying to remove. There are currently two responses to FNOs who are waiting to be removed or who are unremovable. The first response is to grant temporary admission on bail where restrictions can be imposed such as on residence. The second response is detention. According to common law principles, an individual should not be left in detention unless there is a reasonable prospect of removal. However in practice courts have found that detention for years may be considered reasonable. The obvious downsides to the latter policy response are the costs to the taxpayer and the human rights implications of long-term detention.

The second type of UBUs in the UK are 1F-excluded persons. While exclusions have increased in the last decade, the provision is still seldom used and amounts to only one per cent of decisions by the Home Office (although this data only relates to initial decisions and not when 1F is raised in an appeal or to revoke refugee status). Statistics show that Zimbabwe, Afghanistan, Sri Lanka, Iraq and Libya are the main nationalities of exclusions and these individuals are mainly excluded under Article 1F(a) for suspected commission of war crimes or crimes against humanity.

Regarding post-exclusion, the preferred response is to seek removal, but domestic and international human rights law often bar this. The same is also applies to extraditions. As discussed in a previous session, the government has attempted to appease human rights issues in regards to extraditions by adopting MoUs with third states to guarantee issues such as fair trial. Another option is prosecution and the UK has the obligation to prosecute certain crimes, but on a practical level it can prove difficult, unfeasible and extremely expensive.

In light of the challenges to removal another option is for 1F-excluded persons to remain in the UK. In September 2011, the UK initiated the Restricted Leave (RL) policy, which means leave is given for six months periods with possible restrictions on employment, education and access to public funds. 1F-excluded persons granted restricted leave are placed under close scrutiny with the aim of making the experience as uncomfortable as possible. This is to avoid strong ties to the UK being made, which could trigger a claim under Article 8 of the ECHR (right to family life). In 2014, there were 56 people on restricted leave and while there have been a number of challenges under Article 8, in general the UK Courts have been reluctant to decide restricted leave is a disproportionate interference with Article 8 rights. Furthermore, the courts have been unwilling to give specific time limits after which the UK will need to grant these individuals leave to remain.

Dr Sarah Singer concluded by reiterating that UBUs are high on the political and media agenda in the UK, with a strong focus on removal. However the reality is that many people who are unable to be returned or extradited are left in limbo with no viable solution. Therefore there is a need to explore alternative long term responses to this issue.

## Undesirable, unreturnable and no effective remedy: UK country report

*Sheona York, Kent Law Clinic, University of Kent, UK*

The presentation looked at the UK from the perspective of undesirables with a criminal history, whether or not that meets the formal definition of a 'foreign criminal'; and unreturnables who cannot be removed from the UK.

Sheona York introduced her talk by discussing the 2014 UK Immigration Act and the themes within it. The whole tone of the Act sets in place Home Secretary Theresa May's intention to create a 'hostile environment' with measures aimed at dissuading illegal immigrants to stay. For example, Section 117 states that the deportation of foreign criminals is in the public interest and doesn't allow for a person to appeal from inside the UK unless they would face a real risk of serious irreversible harm if removed.

Sheona York then focused on whether it was time to re-examine how Articles 6 and 7 ECHR could be applied to immigration cases. For example, the use of the present tense (i.e. deportation *is* in the public interest) in the 2014 UK Immigration Act suggests that past crimes can also be considered, which in Sheona York's opinion could amount to the imposition of retrospective criminal penalties in breach of Article 7 ECHR and/or denial of a fair trial in breach of Article 6 ECHR.

In the case of *Maaouia v France*, the ECtHR confirmed the exclusion of immigration law from the scope of Articles 6 and 7 ECHR, reasoning that immigration control is a purely administrative matter subject to only public law challenge.

The Court in *Maaouia v France* also stated that Article 6 could not be applied to immigration measures because an expellee has recourse to the guarantees contained within Article 1 of Protocol 7, relating to proceedings for the expulsion of aliens. These guarantees are the protections given in Articles 3, 8 and 13 of the ECHR. However as Sheona York noted, Article 1 of Protocol 7 only applies to those 'lawfully resident' on the territory. Under UK law a decision to deport removes this residency and by doing so also removes the right to protection under Articles 3, 8 and 13 of the ECHR. Sir Nicholas Bratza in a concurring judgment suggested that there might be examples where immigration measures could trigger Article 6. For these reasons it might be time to revisit the reasoning in the *Maaouia v France* case.

Turning briefly to common law remedies for supposed breaches of Article 7 ECHR, Sheona York raised the issue of double jeopardy (*autrefois acquit*) – protecting someone from being tried twice for the same offence. She argued that a person facing deportation because of a past criminal conviction (which was not acted upon by the Home Office at the time of the conviction) effectively means the person is facing a second

penalty for the same offence. According to the legal principle of *res judicata* (the offence itself) a person may be prosecuted for other offences arising out of the same set of facts but the punishment on any further convictions must reflect the harm done and not simply punish the same conduct twice.

Sheona York then moved on to discuss the weakening of the burden and standard of proof in criminal cases by discussing two recent upper tribunal cases regarding deportation and removal, which focused on criminal charges but no criminal conviction. The first one, *Bah (EO Turkey)*, involved a man who had not been prosecuted for any crime, but the tribunal used police evidence to determine that he probably had committed the offences in question, and on this basis his deportation appeal was dismissed. In *Farquharson* a man facing removal after being suspected of several rapes was found guilty and deported by a tribunal even though he did not have access to the witness statements or cross-examination. Both these cases seem to show that criminality was decided by immigration tribunals without a fair criminal trial.

Moving to case law surrounding unreturnability, the House of Lords in the *Khadir* case stated that a person could be kept on temporary admission with no time limit to detention – as long as the Home Office has the intention to remove them. However the *Khadir* case also showed that if it becomes 'simply impossible' to remove then 'it may be irrational' not to grant leave (commonly referred to as the 'Hale threshold'). In *MS, AR & FW*, the Court of Appeal suggested that in 'particular factual difficulties' it may 'not be inconceivable' that the 'Hale threshold' has been reached. Finally, the case of *MA* showed that an applicant must take all reasonable steps in good faith to establish her nationality, and the test of inability to return is to be proved on the balance of probabilities.

Finally, Sheona York highlighted the curious situation of credibility in cases of unreturnability. Once someone has been deemed to be un-credible, it then stands to reason the same person cannot claim to be unreturnable (as any evidence given about a country of origin must be by definition unreliable). Furthermore, once you state a person is un-credible by the same logic it is impossible to return them because you do not know where they came from. Yet the Home Office gives the impression that it is reluctant to accept that removal is ever impossible even in situations of (un)credibility.

In conclusion it is clear the new UK immigration bill has added to the intense and hostile environment migrants and UBUs face in the UK. Further analysis and litigation is needed in relation to the 'Hale Threshold' along with a re-examination of *Maaouia*. One further avenue of enquiry could be to adopt the approach raised by *Limbuella (Adam, R (on the application of) v. Secretary of State for the Home Department*, where the denial of support for asylum seekers that results in homelessness and destitution may breach Article 3 ECHR. Perhaps similar arguments could be raised for persons who are unable to be removed.



### Fifth panel discussion

The discussion began by considering how the Australian government justifies its position in relation to detention after the UN Human Rights Committee determined this was arbitrary detention and inhumane treatment. In response, the government has said it bases its approach on a different interpretation of its human rights obligations. The treatment of international law in Australia is hostile, for example international refugee law has been removed from national law and new provisions do not reference the 1951 Refugee Convention. As mentioned before, a key problem is the lack of domestic human rights law protection.

It appeared to one participant, that with the introduction of more restrictive immigration bills, Australia is moving migration controls inwards from the borders, meaning control is no longer simply about traditionally stopping people crossing into the territory but also removing them from inside the state.

A second discussion focused on whether Article 7 of ECHR should be applied to immigration cases. Some participants argued that deportation itself is not a criminal penalty. However, there may be more flexibility in relation to exclusion cases by relying on Article 6 of ECHR in conjunction with Article 24 of the ICCPR regarding access to fair trial (which is even broader in the ICCPR). Even this is tricky, however, as the Human Rights Committee's General Comment on Article 14 states that it should not be applied to deportation cases. A recent Court of Appeal decision in the UK did discuss the implications of the *Maaouia* case and while it ultimately decided that there was no right to engage Article 6, the court did at least engage with the question. Others took a stronger view, suggesting that the assertion that immigration is an administrative process, so not related to political and criminal rights, should be challenged. If homelessness can activate Article 6 then there is a discretionary element to this right that should be investigated. The *Maaouia* case was decided over 15 years ago, and so it is time to readdress these issues.

It was also suggested that the ECtHR does not wish to apply Article 6 and 7 in the *Maaouia* case, as it might be accused of encroaching on sovereignty issues and Member States' right to control their borders. Because the issue is too political it is unlikely that a solution will come from the ECtHR.

Finally on this point, refugee cases trigger international law through the 1951 Refugee Convention, and so perhaps it is easier to apply Article 6 of the ECHR in these cases as we are clearly dealing with international rights and law. It is possible this avenue may prove to be beneficial in the future.

The cost of detaining persons for years was also discussed. Participants wondered at the rationale behind long-term detention and the expenses involved. For example, it costs the UK government around £30,000 a year to detain someone. However, it is clear the Home Office is afraid of making concessions that may appear to be a pull factor for other migrants. At the same time, this logic of this approach was also questioned – i.e. it is unclear how much influence individual cases/decisions have on migrant or refugee movement.

It was suggested that practices at the Home Office have improved in recent years. Refugee claims are generally refused for the correct reasons and on the whole the quality of asylum decisions has improved. This suggestion created a lively debate and disagreement, with some suggesting many asylum decisions are still based on the opinion of the judge, which creates inconsistency. At the same time, it was argued, it is not necessarily a bad thing when a judge expresses an opinion, if it is based on prior knowledge.

As the session was concluding, it was noted that procedural rights in the two countries (Australia and the UK) are actively being curtailed, with the UK trying to strip or stop the use of human rights law and Australia simply ignoring it.

## Session 6: Approaches in common law jurisdictions (North America)

### Country report: Canada

*Professor Jennifer Bond, University of Ottawa, Canada<sup>2</sup>*

Professor Bond presented her paper on Canada's response to UBUs. Canada's Immigration and Refugee Act (IRPA) incorporates Article 1F of the 1951 Refugee Convention with a series of 'inadmissibility' provisions which concern crime (Articles 34–37). These 'inadmissibility' provisions relate to all non-citizens and each provision deals with many identical acts, meaning there can be overlap between the schemes.

In the recent past Canada has been a harsh environment for UBUs, however rhetoric from the new government both in regards to criminal non-nationals and to refugees in general may signal a change in policy. It will however take time to see if this rhetoric is translated into legal change.

There are six potential bars to removal which are a mix of legal and practical reasons: i) personalised risk in the country of origin; ii) generalised risk in the country of origin; iii) uncertain identity and/or country of origin; iv) statelessness; v) refusal of the country of origin to repatriate; and vi) refusal to sign a declaration necessary for removal to Somalia.

In relation to these potential bars to removal, there are a number of decision-making mechanisms relevant to individuals who are deemed unreturnable. First there is the Pre-Removal Risk Assessment (PRRA), which allows individuals facing removal to seek protection based on an individualised risk they would face on return. Until recently everyone facing removal had access to a PRRA, but recently those who have had a negative refugee decision or PRRA decision in the previous 12 months are barred from the process. A PRRA-1 assesses risk in relation to prosecution contained within Article 1F of the 1951 Refugee Convention. PRRA-2 assesses the same risk but also has a 'danger opinion' which involves the risk or danger involved if the person remains in Canada. PRRA-3 only deals with risk of torture, death and cruel and unusual treatment or punishment but is also subject to a danger opinion. Other mechanisms include: Temporary Suspension of Removal which is a blanket ban on removal to certain countries; Humanitarian and compassionate applications; Temporary residence permits; and Ministerial discretion.

Professor Bond then showed a number of detailed charts, which mapped out the different obstacles and bars to risk assessment mechanisms for individuals suspected of certain types of crimes. For example, an individual cannot be assessed under PRRA-1 if they are deemed to have committed a serious crime. However, the new administration may amend some of these bars.

She then turned to possible outcomes of the decision-making mechanisms and through a number of charts illustrated that there is the possibility of a large number of different outcomes depending on the mechanism applied. Five key outcomes for UBUs are: i) permanent residence (PR); ii) temporary stay of removal; iii) temporary stay while simultaneously under active removal order; iv) placed in legal limbo with no particular status; and v) deportation despite apparent impediment to removal.

In reality most UBUs get a temporary status but no access to PR. Those who are not eligible for PR and deemed to be a security concern or a flight risk, will likely be placed in detention. In 2012, Canada held 9,571 people in immigration detention centres. Once released, house arrest, electronic monitoring devices and restrictions on movement are often used. Furthermore, for persons not eligible for PR there are a number of restrictions and barriers to employment and access to health services (although this has improved in recent times).

Professor Bond concluded by noting the pressure on policy makers is different in Canada than certain countries in the South and in Europe, as Canada's intake of refugees is primarily based on resettlement quotas.

### Deportation and detention in the US: human rights principles and the treatment of unreturnable migrants

*Professor Rebecca Sharpless, University of Miami School of Law, USA*

Professor Sharpless introduced the country report on the US by noting that, unlike many countries discussed at the conference, the US does not apply Article 1F of the 1951 Refugee Convention. Instead there are three tiers of bars to removal: (i) asylum, which as the top tier can turn into residency and citizenship but is discretionary even if a person meets definition of 'refugee' as contained in the 1951 Refugee Convention; (ii) withholding of removal, which is seen as a minimum compliance to non-refoulement. It grants permanent status to individuals but does not include family members, cannot be turned into residency and travel abroad is not permitted unless a refugee document is issued; and (iii) deferral of removal based on Article 3 of the Convention against Torture (CAT), which only applies when there is a risk of torture not inhumane treatment.

While many apply for protection remedies as a way to avoid deportation, a criminal conviction will bar you from the top two tiers. Therefore, 'particularly serious crimes' do not qualify for withholding of removal and the US interpretation of particularly serious crimes is much broader than the international definition, meaning non-simple possession drug crimes, aggravated battery or burglary can be sufficient to disqualify a person from the withholding of removal.

<sup>2</sup> Professor Jennifer Bond was speaking in relation to her academic work at the University of Ottawa and was not expressing the views of the Canadian Government.

Turning to exclusion grounds, Professor Sharpless noted asylum seekers could be excluded on the grounds of national security. Since the terror attacks on September 11, 2001, the link between migration and terrorism is seen as strong and so grounds for excluding people on national security reasons tend to be broad. For example in one case a Colombian who was forced to pay 'taxes' to the FARC before he fled his home state was excluded because those actions made him a 'terrorist supporter'.

The immigration enforcement system in the US is massive, with 24,000 people held in detention every day (in 1996 it was 6,600). At the same time as pushing immigration reform, the Obama Administration has been increasing deportations, with 400,000 persons deported each year. If you are an immigrant and you are convicted, there is a high chance you will be deported. For this reason, the Supreme Court ruled that lawyers have a responsibility to explain the immigration consequences of a criminal plea to an immigrant, suggesting that deportation has become part of the punishment.

Professor Sharpless focused the rest of her presentation in particular on those immigrants who have a criminal record and have been ordered to be removed under domestic law, but whose deportation would violate human rights law. In *Smith & Armendariz v. U.S.*, the Inter-American Commission held that the US Immigration law of 1996 violates international law by not allowing an immigration judge in most cases to consider a petitioner's right to family life and the best interests of their children. However, it appears the US is currently showing little interest in expanding domestic law in this area and demonstrates a reluctance to incorporate international human rights norms in general.

The Supreme Court has held that if, after six months of detention, deportation is not foreseeable and the person has been cooperating with the authorities then they should be released under an Order of Suspension. However, the government may argue that there is a 'danger exception' to this, which has been invoked frequently (for example in relation to the mentally ill). Between 2001 and 2011, 12,567 people were released under an Order of Suspension. However in January 2012 almost 500 people remained in post-removal order detention for over six months. A re-detention rate of seven per cent is deemed low by the US Immigration authorities.

Professor Sharpless briefly touched on offshore detention centres, such as the facility at Guantanamo Bay, noting they are something akin to a secret world. In recent years the number of inmates has reduced, with the Obama administration publicly stating they wish to close the facility. While there are restrictions on releasing inmates from Guantanamo Bay into the US, there have been negotiations with third countries to remove some of the inmates. In addition, the US Supreme Court has ruled that

inmates have the right to *habeas corpus* and so can bring claims in the US Federal Court.

In relation to Haitians fleeing the earthquake in 2010, the US granted Temporary Protected Status (TPS) to many, but persons with a felony are barred from the TPS process. They would thus qualify for deportation. When deportations to Haiti restarted in January 2011, returnees were immediately detained by the Haitian government and the process has received a great deal of criticism, with one incident of a deportee dying. Since then there has been a balancing test to decide whether the deportation should occur.

### Sixth panel discussion

The discussion began by looking at the history of deportation in the US. It was suggested that the US could be shooting itself in the foot in deporting Haitians. Similar patterns occurred in the 1990s when the US deported people back to Central America, which is now seen as directly affecting the proliferation of gangs in neighbouring countries, which in turn has produced new waves of forced migration to the US. In relation to the current deportation of Haitian nationals, it was noted that the Haitian government believes the US is only deporting dangerous criminals (hence why they are all incarcerated upon arrival) but in reality a great number of returnees are mentally ill or sick people. It was argued that the current approach seems unfair to the deportees and unfair to Haiti.

A second discussion started by looking at the UNHCR Exclusion Guidelines of 2003, which makes clear Article 1F should not be confused with Article 32 and 33 of the 1951 Refugee Convention. It was then questioned whether Canadian and US domestic law conflates 1F and Article 33(2) of the 1951 Refugee Convention. Furthermore, it seemed as if both countries apply common law over international human rights law and treaties. In relation to Canada it was suggested that this conflation of 33(2) and 1F in domestic legislation is problematic as under Refugee Status Determination processes if an asylum seeker is deemed inadmissible, the applicant loses the right to a refugee hearing. Canada uses both common law principles (including those relating to human rights) and international treaties. In the US the common law situation is complex, and the normal constitutional constraints for protection do not apply to immigration. There has been some movement but the common law is not generally seen as a friend of immigration.

Finally a discussion focused on the issue of teasing out active security risks from other normative issues such as state policy used to deter low risk people from attempting to remain in the State or even enter the State. In most states such as Canada, the legislation does not currently reflect this issue.

## Session 7: Approaches in other countries

### Undesirable and unreturnable in Brazil: refuge, exclusion and illegal acts

*Professor Liliana Jubilut, Universidade Católica de Santos, Brazil*

The conference then moved onto to discuss the situation in some countries in the Global South. First, Professor Jubilut discussed UBUs in the context of Brazil. She noted that no one in Brazil is talking about the issue of UBUs, with the media ignoring the issue and little pressure on the government to act in a particular way. For these reasons there is also little data (for example no official data on the number of expulsions per year or reasoning behind refused refugee cases). She then outlined the broad system in Brazil in relation to UBUs, starting with the legal framework and mechanisms for removal.

In Brazil there is a dual legal system with regards to migration and refugee affairs. The outdated migration law from the 1980s deals with all aliens and was made during the dictatorship and hence shows little reference to human rights. The 1997 law on the other hand deals with refugees, includes the expanded refugee definition of the Cartagena Declaration and has been subsequently praised by UNHCR.

Turning to forcible removal, in Brazil there are three mechanisms: i) deportation, which is an administrative procedure run by the Federal Police. If the deportee arranges for a new visa or fixes the administrative issues, they will be allowed back into the country; ii) expulsion for crimes committed on the territory or threats to national security. These individuals cannot return unless the Minister of Justice removes the order of expulsion; iii) extradition – this is used when the prosecution of a crime is to take place outside of Brazil.

There are two categories of UBUs in Brazil: i) foreigners who commit a criminal act in Brazil; and ii) excluded asylum seekers. However, there is no real procedure to deal with UBUs and alleged war criminals who have been excluded from the RSD process (in Brazil inclusion is considered before exclusion) are simply left to live out semi-clandestine lives in Brazil while, in theory, being able to be submitted to deportation.

One case regarding UBUs that caused an interesting public reaction in Brazil was that of *Battisti*, a convicted politically motivated murderer from Italy who fled to various countries before ending up in Brazil. He arrived as a foreigner but when he was about to be extradited, claimed refugee status. On appeal refugee protection was granted, in response Italy requested extradition. The Brazilian Supreme Court finally found that the executive branch decision to grant refugee status was subject to judicial review and ultimately, even though he was not extradited, his refugee status was revoked. Academics wondered at the time whether an argument could have been made for political asylum, which has a strong tradition and history in Latin America. However political asylum is discretionary with no inclusion criteria and based on a political decision. While this is an area that has not been looked at for

UBUs, especially on the grounds of humanitarian concerns, it is unlikely it holds many answers as political asylum in practice is usually reserved for very high-profile individuals.

Professor Liliana Jubilut concluded by suggesting that in reality there are very few UBUs in Brazil. As it does not seem to be an issue, there is no real system in place to address the situation of UBUs. Therefore UBUs are currently left in limbo, as they cannot be removed but are also barred from migration or refugee status. Many stay as irregular migrants, living outside the legal system in an informal way. However it seems sensible to start preparing public policy for an issue that is only likely to increase in the future so the interests of the state and those of the individual can be balanced.

### Turkey: the challenging problem of ‘undesirable and unreturnable’ asylum seekers

*Didem Dogar, McGill University, Canada*

Didem Dogar introduced the country report on Turkey by commenting on the stark contrast seen with regards to UBUs in Turkey, compared to other EU states. Turkey currently has 2 million refugees and is seen as a transition country to the EU.

The presentation focused only on refugees and asylum seekers. As was discussed in relation to other states, data is sporadic at best. There are 2,291,900 registered Syrian refugees and 115,340 registered Iraqis in Turkey but no public data is available on who is being excluded and/or deported. UNHCR is also not sharing this type of information.

A new law on immigration was adopted in 2014 (Law on Foreigners and International Protection – Law 6458), which attempts to address the issue of UBUs although problems still persist. Up until that point refugees were generally rejected and deported on the basis of local provisions relating to national security and public order, however under the new law (Article 64) there are additional excludable acts such as the commission of inhumane acts outside Turkey and offences defined in Article 1F of the 1951 Convention.

The new 2014 law relates to all migrants except Syrians, who fall under a special regime, the Temporary Protection Regulation. Article 8 of the regulations deals with exclusions and states that Syrians who are not granted temporary protection due to suspected criminality can be held in detention until removed. This raises clear problems in relation to non-*refoulement* and Turkey's obligations under CAT.

Undesirables who are prevented from being deported by Article 3 of the ECHR are left in a limbo situation. In the past Turkey has attempted to deport people even when there is a risk to life or torture. In *Abdulkhani and Karimnia v Turkey*, the applicants were ex-members of People's Mojahedin Organisation in Iran who fled to Iraq and were recognised there as refugees by UNHCR. They then travelled to Turkey, were

arrested and deported back to Iraq. They came back to Turkey a second time and requested asylum due to fear of death or ill-treatment if they returned to Iraq. Turkey attempted to deport them regardless but the ECtHR reaffirmed the absolute nature of Article 3 (ECHR) irrespective of the actions of the person concerned.

The new law on immigration has introduced a humanitarian residence permit, which puts a bar on removal. This is renewed annually and there is the option for a judicial appeal against negative decisions. However this permit is seen as temporary in nature as holders cannot apply for citizenship or long-term residence permits.

Finally, there is also the issue of foreign fighters. As of December 2015, 2,776 foreign fighters of 89 different nationalities were deported from Turkey. Furthermore, 33,609 foreign fighters of 123 different nationalities were banned from entering Turkey as of December 2015. However, very little is known about the government mechanisms involved. It is unclear if there was due process for these people and whether the principle of non-refoulement was violated. While this issue is not prominent in Turkey currently, it was suggested that this could be the source of future case law for the ECtHR.

#### **Invisible people: suspected LTTE fighters in special refugee camps of Tamilnadu**

*Sreekumar Panicker Kodyath, NA Palkhivala Academy of Advanced Legal Studies and Research, Calicut, India (co-author Sheethal Paadathu Veettil, Tata Institute of Social Sciences, Mumbai)*

Mr. Kodyath's talk focused on the 100,000 Sri Lankan refugees that have come to India due to internal conflict in Sri Lanka. While the treatment of Sri Lankan refugees was adequate at the beginning of the conflict, the situation changed after the terrorist attack by a suicide bomber from the Liberation Tigers of Tamil Eelam (LTTE) in 1991. After that moment two systems – regular camps and special camps for special refugees (people who were thought to be supporters of the LTTE) were set up by the state. The special refugees were sent to quarantine for one month and if they were unable to demonstrate that they were not a threat or involved with the LTTE, they were moved to the special camps.

Normally the only viable and legal way for Sri Lankans to leave a refugee camp is by committing to repatriation. UNHCR has a return program (which includes funds) to Sri Lanka although there are real concerns that some refugees are being repatriated even though the risk of suffering serious human rights violations upon return is high (such as torture camps).

Turning to the special camps specifically, the conditions inside are bad, with no family visits permitted, no permission to consult lawyers and appalling facilities. The special camps have not been inspected since 1999 and international organisations

such as ICRC are barred for entering. There is no real legal framework in relation to the special camps, and India has not signed the 1951 Refugee Convention so all refugees are simply seen as foreigners. While UNHCR does have a mandate in India it is very limited – to assist in the return of refugees and help people who make it to their Delhi or Chennai office.

From the available data there were 4,000 persons in the special camps in 1998 but only 55–100 persons in 2009. Current data suggests there are now only 20–25 people left in the camps. The key question that remains unanswered is what happened to the 1,000–4,000 refugees who were removed from the camps since 1998? It is incredibly hard to find out any information on this from either the government or refugees themselves, particular when this was in the pre-mobile phone era. Whether they were released, deported or sent to a third country is unknown and the Government is currently unwilling to answer any questions relating to this issue.

Finally, briefly turning to the legal framework, Section 3 of the Foreigners Act 1946, gives the Central Government unqualified power to prohibit entry, arrest, detain and expel foreigners without the opportunity of a hearing or appeal. Moreover, judicial attitude keeps changing, with huge discretion used in each case. However, even if a UBU is granted a stay against deportation, they will likely be sent back to a refugee camp.

Mr. Kodyath concluded by stating his desire to continue his research to uncover more information on what happened to the approx. 4,000 refugees who were removed from the special camps between 1998 and 2009.

#### **Seventh panel discussion**

Discussions focused on the three country reports. First, the political dimension of refugee settlements in India was discussed. During regional elections in Tamilnadu, where the special camps are located, some refugees and/or UBUs are often released from prison for political reasons as the area has close ethnical and cultural ties to Sri Lankan Tamils. Although after the elections the refugees are normally rounded up and detained again.

The conversation then moved onto Special Camps. When UNHCR set up emergency camps in neighbouring states to protect refugees fleeing conflict they normally separate out suspected combatants and civilians, although in many situations the host state takes control of the camps. In Turkey, all Syrian camps are regulated by the government, which also separates suspected combatants from the general refugee population.

In relation to Turkey, it was noted that it still has a geographical reservation on the 1951 Refugee Convention and so does not officially recognise refugees coming from outside of Europe, however UNHCR conducts a parallel RSD process for non-Europeans. Since 2014, the government should in theory be in complete control of the RSD procedure but currently there

is a transitional period and in practice UNCHR is still heavily involved in the Refugee Status Determination (RSD) procedure concerning non-Europeans for resettlement purposes.

Finally, in Brazil detention only occurs if a migrant commits a crime in the country or doesn't leave after an order to do so. Brazil has also been conducting a resettlement programme for Colombian refugees since 2014. High-risk refugees in neighbouring countries to Colombia can now be resettled in Brazil within 72 hours.



## Session 8: Approaches by international organizations

### Refugee adjudication under the UNHCR's statute or mandate and the exclusion dilemma

*Professor James C. Simeon, York University, Canada*

Professor Simeon sees refugees as the symptom of the declining state of 'peace' in the world today. Looking at the root cause of these forms of migration, he noted that a third of the world is engaged in armed conflicts that are of a protracted nature. Furthermore, UNHCR sees conflict as the main driver of forced migration today, with the trend only increasing in coming years to the point where we are already at a stage where the numbers involved are beyond the capacity of international organisations to cope.

With the increase in numbers, it is reasonable to say the exclusion clauses based on Article 1F will become more and more pertinent. We are however dealing with complex problems and so more data and information sharing is needed on exclusions and how states and institutions like UNHCR deal with the issue. Transparency is always a good thing and UNHCR could start sharing more information obtained from the RSD process (while maintaining the anonymity of applicants).

In relation to exclusion, Professor Simeon believes inclusion should be assessed before exclusion. Before you can exclude someone you have to first determine whether s/he is a refugee. In addition, it is implicit in the system that there are people who will be excluded and so states have to develop appropriate and measured ways to respond.

As a world leader in RSD, UNHCR could take the lead and be more vocal on UBU issues. For example, while the 1951 Refugee Convention gives no direction as to RSD procedures, over time UNHCR has stepped in and created sets of guidelines that have been adopted by states. With a unit in Geneva that deals with exclusion (the Protection and National Security Unit) and the 1951 Refugee Convention silent on what to do with excluded persons, perhaps it is time for UNHCR to develop policy or soft law in this area?

Professor Simeon agreed with previous comments, suggesting that while policy makers need time to address these issues, these concerns are coming to the fore and it is better to consider them in advance rather than wait until they become overwhelming. While this conference has shown that the numbers of UBUs in some jurisdictions are relatively low, this will not likely remain the case. He concluded by noting that in the first instance the focus should be on rehabilitation and local integration of UBUs. If they are deemed to be a legitimate danger to the public then relocation to a third country (with assurances) may be necessary. However no one should be left in limbo.

### Union law solutions for excluded persons

*Professor Hemme Battjes, Vrije Universiteit Amsterdam, Netherlands*

Professor Battjes looked at potential EU solutions to the issue of 1F-excluded persons with a focus on the Netherlands.

In the EU, exclusions from asylum are regulated by the Asylum Qualification Directive 2011/95/EU (AQD). The question is whether states are allowed to adopt a balancing exercise when considering exclusion for asylum under the AQD. For example, for a relatively minor crime exclusion may have very grave consequences for the asylum applicant. In the case of *B and D* the European Court of Justice (ECJ) was asked whether exclusion from refugee status under the AQD's equivalent of Article 1F of the 1951 Convention requires a proportionality test for each case. Furthermore, if so, should protection under Article 3 ECHR or national rules be taken into account when applying the proportionality test? This idea of proportionality has been put forward by UNHCR in the past, with the idea that the level of criminality should be balanced against other factors such as the consequences of exclusion for the individual. However the ECJ appeared to reject those arguments and the possibility of balancing.

States do have the option of granting an excluded asylum seeker another national status outside the remit of the AQD. Dutch law though is very strict on 1F-excluded persons, with all legal status options excluded (with one exception being humanitarian status).

Turning to other EU law that could be applied to 1F-excluded persons, first there is the Family Reunification Directive (2003/86/EC), which sets out scenarios when an excluded individual may be issued a residence permit by a member state where a family member resides (who fulfills particular criteria). Second, the Citizenship Directive (2004/38/EC) may also apply if a spouse is an EU citizen. Both the Family Reunification Directive and the Citizenship Directive make no explicit reference to excluding 1F-excluded individuals in their grounds for refusing admission. However both Directives allow states to exclude person from a status on public order grounds. In the view of many (including Dutch law makers and judiciary), the exclusions of a person under 1F is such a public order ground.

The ECJ jurisprudence in relation to public policy and national security is well developed and while it gives states some discretion, exclusion grounds can only be applied to persons who pose 'a real, present and sufficiently serious threat'. While the case law applies to third country national family members of migrated EU citizens, recent case law looked at whether this view on public order clauses should apply to the Family Reunification Directive and the Citizenship Directive.

In *Zh. and O. v Staatssecretaris voor Justitie*, the Dutch Court asked the ECJ whether a criminal conviction was sufficient to view an illegally present third country national as a risk to

public policy for the purposes of Article 7(4) Returns Directive (2008/115/EC). The Court said that a mere conviction is not enough in relation to freedom of movement cases. Rather they should be decided on a case-by-case basis to decide whether the actions of the person posed a genuine and present risk to public policy. In the case of *H. T. v Land Baden-Württemberg*, the ECJ was even more restrictive in its approach, stating that in the case of specific articles in the Citizenship Directive (again in relation to freedom of movement cases) the concept of public order refers to genuine, present and sufficiently serious threat. Professor Battjes saw no reason why there would be a different outcome in relation to the Family Reunification Directive.

The Dutch Council of State (DCS) in contrast issued a judgment just before the *H. T.* case but after the *Zh. and O.* case in which is stated that 1F(a) crimes are so serious that the threat is always genuine and present. The reasoning behind this came from Article 12(2) AQD and the ECJ case of *Boucheraeu*, which broadly stated that past conduct maybe enough to constitute a present threat. However Professor Battjes was not convinced on the 'present threat' argument as put forward by the DCS. It appears that currently in the context of 1F and public policy the concepts of crime and threat are taken to mean the same thing.

Turning to the EU Returns Directive (RD), the basic approach is a third country national must have legal presence in the state or he or she has to leave (Article 6 RD). There is one exception – a state may grant a residence permit on compassionate or humanitarian grounds. If a return decision is made, then the state must take the necessary measures to remove the person (Article 8 RD). However the state must postpone this action if an obligation of non-refoulement applies (Article 9 (1) RD). Finally, the continued or indefinite presence of an individual on the territory without a status is clearly a grey zone between the obligation to remove the person and the obligation to give some form of legal presence.

Article 3 ECHR prohibits the expulsion of third country nationals in exceptional circumstances on compelling humanitarian grounds (for example people close to death). In the case of *M'Bodj* the ECJ considered whether persons to whom such exceptional circumstances apply fall within the scope of subsidiary protection under the AQD. The Court stated that humanitarian cases are outside the scope of the AQD and instead states should use a national status for granting leave on humanitarian grounds. However, in the case of *Abdida*, the court stated that expulsion must be postponed when the EU Charter on Fundamental Rights (Article 19(1) – the obligation for a state to provide for the basic needs of a person pending appeal hearings) is read in line with Article 3 ECHR. In relation to the provision of basic needs, the ECJ noted Article 14 (1) (b) RD requires a person to have access to emergency health care/essential treatment during the time a state is required to postpone a removal. What 'basic needs' means is left to states, but the ECHR in *MSS* stated food, hygiene and shelter fall within this concept.

While this suggests at the very least the very ill have a remedy, Professor Battjes queried whether the implications (particularly of *Abdida*) were wider. For example, the obligation to make provision for basic needs is linked to the idea of non-refoulement (Article 9(1)(b) RD). Article 14 of RD furthermore requires expulsion to be postponed as far as possible to keep families united, and keep children in school. These requirements cannot be met if no care is being taken of the family and children's basic needs during the period of postponement. Finally, the Preamble (12) to the RD states that the basic conditions of subsistence of an illegal third country national cannot be denied and should be defined. Perhaps then there is scope within EU law for stronger status and rights for certain 1F-excluded persons.

### Non-removable returnees under European Union law – status quo and possible developments

*Mr Fabian Lutz, European Commission, Brussels*

In the EU there are 500,000 return decisions a year, with 200,000 carried out. Of the 300,000 remaining, there are two main reasons for non-removal: i) non-cooperation of third countries or ii) non-cooperation of the returnees.

Fabian Lutz spent a good proportion of his presentation introducing the EU Commissions Returns Handbook, which is based on the RD, sets out recommendations for states and has potentially become a form of soft law. The Handbook suggests detention should be imposed for a maximum of six months (although in exceptional circumstances 12 or 18 months are permissible). Detention should not be unlimited and should only be deployed if return is feasible. Therefore, detention can only be used for the purpose of removal; states cannot simply detain persons for immigration reasons (i.e. a backdoor to detain people who are unwanted), although domestic criminal law could be applied for public order offences.

In relation to rights, Article 14 of the RD contains the basic rights of unreturnables, which was inspired by the Reception Directive's standards in relation to asylum seekers. It does not include employment rights but does refer to family unity, emergency healthcare and minors and vulnerable people. EU case law has helped flesh out some of these rights. For example the ECJ noted that while Aids treatment is included in emergency healthcare, basic food subsistence also goes hand-in-hand with this. Article 14(2) also confirms that states should give unreturnables paper documentation so they can show these to the police and avoid detention.

The RD remains silent on regularisation, although Article 6(4) gives states the option of granting status on humanitarian grounds. The ECJ has stated that the objective of the RD is return, not regularisation. The EU Commission sees a clear legal gap when UBUs are left in limbo. Responding to these concerns, the Commission made suggestions to member states, setting out 10 criteria in the Handbook, ranging from the level of cooperation of the returnee, the length of factual stay,



integration efforts made by the returnee to family links and the need to avoid rewarding irregularity. However, member states fear this sends a message to irregular migrants that there are ways to gain permanent status. Two years ago, the Commission proposed harmonization on the topic with a discussion paper circulated amongst states. It looked at the possibility of regularising people who cooperate. Again, however, there was unanimous rejection of this idea by member states (which in itself is rather unique). Member states are wary of taking on extra obligations, or being caught in a soft law “trap”, and so prefer that decisions on UBUs are kept at the national level. This may stem from a fear of ECtHR and ECJ case law premised on a rights-based approach.

Finally, Fabian Lutz concluded by looking at what to realistically expect in this area in the near future. First, the use of detention will likely remain widespread amongst member states. The jurisprudence of the ECJ, however, might improve the rights of UBUs. The development of policies on the regularisation of unreturnables is unlikely even with the publication of the Handbook and 10-point plan. States are likely to be hesitant to accept new regulations from Brussels in this regard. The focus of states will more likely be on (i) creating incentives for return (a ‘red carpet’ approach including financial packages); (ii) alternatively, sending UBUs to third countries; and (iii) a push to criminalise non-cooperation of returnees.

#### **Eighth panel discussion**

The discussion opened with a focus on UNHCR’s role. The organisation has expressed its opinion on when to exclude and when not to return but currently provides no guidance on what to do with these people following an exclusion decision. The same situation occurs within the EU. It was suggested that UNHCR considers persons excluded from the 1951 Refugee Convention under 1F to fall outside the mandate of the institution and therefore it would be hard to gain its support

for drafting guidelines on UBUs. However, recently published documents by UNHCR, which refer to excluded persons, might suggest a willingness to at least engage with the issue.

Turning specifically to the EU, first the EU-Turkey joint action plan (readmission agreement for third country nationals) was discussed, which was seen by some as a form of cooperation to control migration flows. It was noted that refugees and asylum seekers cannot be returned unless there is a negative RSD decision. Re-admission agreements also exist outside Europe as can be seen from the relationship between Pakistan and Sri Lanka.

In EU member states there is an 18-month maximum detention period, although non-cooperation can be a reason to detain UBUs. While long-term detention appears to benefit no one, perhaps states see the value in detaining small numbers to act as a deterrent to others.

The idea of a Guantanamo Bay detention centre like situation or removal of undesirables to a third country by the EU was effectively dismissed due to recognition that all states within the EU are bound by international human rights law, even in relation to treatment in third countries. However it could be possible to return a person to a third country if he or she agreed to the transfer.

In the US, exclusion is considered before inclusion and there is no domestic movement trying to challenge this idea. Strategic litigation could though help politicise the debate. While there is healthy dialogue between the US and EU on a number of issues, it appears that on return and asylum they are currently in separate worlds.

Finally, it was suggested by some that law and justice are drifting away from one another, with a proliferation of restrictive domestic law and expulsions for minor crimes (i.e. minor criminals being treated the same as terrorists).

## Session 9: Roundtable discussion: Towards harmonised solutions

The roundtable started with a recap by the organisers of the starting position at the beginning of the conference and some key points taken from the two days.

1. Scope: The conference focused on a broad range of immigrants, asylum seekers as well as other types of immigrants. *Undesirability*, as defined in this conference, can be caused by three types of measures which relate to serious criminality:

- i) Article 1F exclusion of persons believed to have committed crimes before arriving in the host state. While it is difficult to determine the size of this group, it appears small within the European and US setting. However it is likely to grow in the near future;
- ii) Revoking the status of persons who commit crimes after arriving in the host state. From the available data this group appears large;
- iii) Not granting status or revoking a status because of adverse security assessments. This issue appears small in scale, with people who fit this category seemingly in the hundreds rather than the thousands.

The problem of *unreturnability* exists due to both legal and practical reasons.

There is incredible diversity between the people contained within these groups, from petty criminals to alleged war criminals and suspected terrorists. In addition, public perceptions of the issue are mixed. Some communities accept the inclusion of UBUs in the host state while the climate in other countries is extremely hostile.

2. Policy responses on how to deal with UBUs: Looking at solutions, prosecution and extradition are possible but there are considerable obstacles to both options. The use of bilateral MoUs has also had limited success. The granting of temporary status appears to differ greatly among states (for example Norway, the UK and France all appear to grant temporary status on different grounds with different conditions attached, whereas e.g. the Netherlands does not grant any status at all); All modalities cause economic and social harm to the individuals involved and appear to be a result of political contestation on the parts of states who are at a loss as how to respond to the issue.

3. Alternative approaches: There are many ways to tackle the issue of unreturnability, such as changing the system to bring down numbers, which could involve i) limiting instances of revocation of refugee status and citizenship; ii) limiting 1F exclusions only to cases where prosecution is possible. Alternatively, other approaches could involve offering incentives to return or third country resettlements negotiated through diplomacy and assurances. Regardless of what approach is used, there will always be people left in the host state. Responses to these unreturnables could include:

- i) Detaining or housing UBUs in prison or a designated reception facility (as happens in the US, Australia and Denmark);
- ii) Using a model whereby there is the possibility of granting some form of permanent status after unremovability has persisted for a number of years, as is the case in Sweden;
- iii) Mechanistic approach – issuing a residence permit after a certain period of time has passed in which the individual has demonstrated that they cannot be returned and any security issues have been resolved;
- iv) A Coherent Balancing Test – balancing a number of factors before granting a form of permanent status, such as security tests, assessing the crime that was committed/alleged to have been committed and level of involvement of the individual in the crime, the time passed since the crime occurred and any humanitarian considerations on part of the individual, such as serious medical issues.

The floor was then opened for a discussion.

The roundtable discussion focused on the two main themes of *scope* and *policy response*. In addition, throughout the conference and the roundtable concerns were raised regarding the lack of publically available data on UBUs by states and international organisations.

### Scope

It was suggested that the goal should be to reduce the number of UBUs as much as possible. One way to go about is to use more strict criteria in excluding individuals. Another option discussed was to use a proportionality test after someone is excluded and when return is being contemplated. Factors which could then be taken into account are e.g. when the alleged crime was committed and the level of complicity.

While this approach may be possible when simply focusing on 1F-excluded persons, alternative approaches may be needed if UBUs are defined more broadly. If the focus is narrowed to 1F-excluded persons, however, then these solutions may have qualities transferrable to other groups of UBUs.

One reason put forward as to why we do not have a robust definition of undesirability is that each state sees the issue slightly differently. While the UK's definition is widening, others are narrowing. Another option would be to treat all UBUs as if they were nationals.

The scope of the issue is an interesting debate, with each group of UBUs giving rise to different issues. Keeping the typology wide at this stage allows for comparative analysis (i.e. how group one compares to group two). Lateral discussions of this nature are very helpful.

### **Policy response**

States are currently only responding with short-term responses to UBUs when in fact this is a long-term issue. It is clear however that states are aware that many people are left in legal limbo and current approaches are unsustainable in the long-term.

It was noted that there has been a lack of leadership on this issue internationally. This might be explained by the sensitive legal and political issues involved, capacity to deal with the UBU issue (e.g. costs of prosecution, extradition, rehabilitation) or the prioritisation of other concerns.

In relation to returns and removals, it was suggested that if states in the EU were serious about these options, then member states should negotiate together. For example, States could together negotiate assurances with a particular or number of third States as part of a removal or extradition process. Such an agreement might have more persuasive when assessed by a national or supranational court.

Rehabilitation was seen as a purposive approach to this issue. If you focus on rehabilitation for the majority, (i.e. those who have a low level of complicity in 1F crimes or are prosecuted in the host state for relatively minor crimes) you are then left with a smaller group of more serious (suspected) criminals who should be prosecuted. However, in the UK criminal system rehabilitation is not available to foreign nationals and this approach is unlikely to receive much support from the government.

Even within the category of 1F-excluded persons, there is the possibility of a wide range of responses ranging from punishment to rehabilitation. For example it was suggested that for child soldiers there should be hope and a push for rehabilitation, while perhaps punishment is the most suitable response for a person who committed war crimes decades earlier. Individual circumstances therefore need to be taken into account when responses to UBUs are determined.

Local integration is also a complex issue, which has become a hot topic again due to the Syrian crisis. Integrating 1F-excluded persons is particularly difficult where proximity to the home state is an issue, although it was suggested that perhaps third country integrations might be a more successful. In the UK, INGOs such as Detention Action have adopted successful grass root programmes to aid integration of young FNOs, for example the 'Community Support Groups' initiative.

It was also noted that proximity plays a role when discussing responses. The response of India and Turkey (in a context where two million refugees have fled across its borders in recent years) to UBUs will be very different to countries like Canada, whose refugee population is based on tightly controlled resettlement programmes.

Turning to responses in the context of Europe, it was suggested that responses by EU states show the conflict that still exists between human rights law and domestic policies based on security and sovereignty. While states are required to follow the jurisprudence of the ECtHR, in reality they wish to avoid a rights-based approach to UBUs and be left alone to make their own decisions on an individualised case-by-case basis.

Obviously this raises grave concerns, as an individualised case-by-case approach runs the risk of granting wide discretion to states. Where two states will deal with the same issue in completely different ways, this could run counter to the demands of fairness and justice. Potentially there is a role for the European Commission to create an overarching rights-based framework, which would allow for some individual state discretion.

Finally, the approach taken by Sweden was discussed. In relation to 1F-excluded persons, Sweden has a three-pillar system. Under Pillar three, even though undeserving of protection a person may be granted residence (although where possible any crimes should be prosecuted). Similar to Norway, UBUs are given temporary status first, for a maximum of 1 year at a time. Eventually though the person can gain permanent residence, and rehabilitation is always an option. This very narrow approach taken by Sweden, which focuses on the seriousness of the crime, could be worthy of further study.

## ***“Undesirable and Unreturnable?”***

### **Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but Who Cannot be Removed**

International Conference, 25 and 26 January 2016  
Institute of Advanced Legal Studies, University of London

‘What do we do with Abu Qatada?’ Impediments to the expulsion of migrants suspected or convicted of serious criminality pose an increasing challenge for public policy in both the national and international spheres. These obstacles can be ‘practical’, such as the lack of means to send the person to their country of origin, or ‘legal’ in nature, as where human rights standards prevent removal. However, even though such cases appear comparatively few in number, they tend to attract significant public interest due to the real concerns that they generate for State migration control, the integrity of the institution of asylum, the role of human rights in contemporary society, and the bringing to justice of perpetrators of serious crimes.

The archetypal expression of this problem is presented by those asylum-seekers excluded from refugee status due to suspected involvement in serious crimes - as defined by Article 1F of the Refugee Convention - but who cannot be removed from the host State’s territory on other legal or practical grounds. The alleged Rwandan *genocidaires* seeking asylum in the UK are a case in point. A greater tendency to apply exclusion clauses in the last decade means that such cases are becoming increasingly common. Moreover, other migrants who have attracted adverse attention as a result of alleged criminal activities in the host State may end up in a similar situation, including former refugees such as Abu Qatada. The variety of measures adopted by different countries and their often ad hoc nature suggest that States do not know how to respond effectively to this issue. In the case of migrants suspected of having committed serious crimes overseas, the host State is faced with further uncertainty over whether it should seek to prosecute. The challenges here are of a different order, but the response of States is equally hesitant.

By providing a forum for advancing thinking on these challenges, the ‘Undesirable and Unreturnable?’ conference seeks to integrate a wide range of participants from the academic community and beyond, including new researchers, research students and national and international policy-makers, addressing these issues in a comparative international perspective from the standpoint of both legal and non-legal disciplines. This AHRC-funded conference provides an important forum to share knowledge on and compare the practice of selected States around the globe, and review policy and other measures taken in addressing this issue of asylum seekers and other migrants suspected of serious criminality.



## CONFERENCE PROGRAMME

### Day One

9:00 – 9:30	Registration
9:30 – 9:45	Welcome, opening remarks and introduction – <i>Dr. David James Cantor</i> (RLI) and <i>Dr. Joris van Wijk</i> (CICJ)
9:45 – 11:15	<p><b>Session 1: Prosecuting undesirable and unreturnable migrants</b></p> <ul style="list-style-type: none"> <li>• ‘Prosecution of Undesirable and Unreturnable Persons’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Joseph Rikhof, University of Ottawa, Dept. of Justice, Canada</i></li> </ul> </li> <li>• ‘Undesirable yet Unreturnable - Extradition and Other Forms of Rendition’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Geoff Gilbert, University of Essex, UK</i></li> </ul> </li> <li>• ‘When International Criminal Justice Concludes: Undesirable but Unreturnable Individuals at the ICC’ <ul style="list-style-type: none"> <li>◦ <i>Emma Irving, University of Amsterdam, Netherlands</i></li> </ul> </li> </ul>
11:15 – 11:30	Coffee/tea break
11:30 – 12:30	<p><b>Session 2: Other measures for addressing their situation</b></p> <ul style="list-style-type: none"> <li>• ‘Deporting Undesirable Migrants: Diplomatic Assurances and the Challenge of Human Rights’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Mariagiulia Giuffré, Edge Hill University, UK</i></li> </ul> </li> <li>• ‘Removal, Voluntary Return and Relocation: A Case Study of 1F Excluded Individuals in the Netherlands’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Joris van Wijk, VU University Amsterdam, Netherlands</i></li> </ul> </li> </ul>
12:30 – 13:30	Lunch break
	Recap of the morning program, introduction of the afternoon program
13:30 – 15:00	<p><b>Session 3: Practice in the European Union, civil law jurisdictions I</b></p> <ul style="list-style-type: none"> <li>• ‘New Exceptions to the Principle of Non-Refoulement: The German Case’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Burcu Toğral Koca, Eskişehir Osmangazi University, Turkey</i></li> </ul> </li> <li>• ‘Undesirable and Unreturnable Migrants under French law: Between Legal Uncertainty and Legal Vacuum’ <ul style="list-style-type: none"> <li>◦ <i>Chloé Peyronnet, Université Jean Moulin Lyon 3, France</i></li> </ul> </li> <li>• ‘Non-removable Migrants Suspected or Convicted of Serious Crimes in the Netherlands’ <ul style="list-style-type: none"> <li>◦ <i>Maarten Bolhuis, VU University Amsterdam, Netherlands</i></li> </ul> </li> </ul>

15:00 – 15:15	Coffee/tea break
15:15 – 16:45	<p><b>Session 4: Practice of European States, civil law jurisdictions II</b></p> <ul style="list-style-type: none"> <li>• ‘The Situation of Undesirable/Unreturnable Migrants in Norway’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Terje Einarsen, University of Bergen, Norway / Mi Hanne Christiansen, Norwegian Directorate of Immigration</i></li> </ul> </li> <li>• ‘Undesirable and Unreturnable: A Case Study of Italy’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Marco Odello, Aberystwyth University, UK</i></li> </ul> </li> <li>• ‘The Indefinite Detention of Undesirable and Unreturnable Third Country Nationals in Greece’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Eleni Koutsouraki, Panteion University, Greece</i></li> </ul> </li> </ul>
18:00 – 21:00	Evening meal at TAS restaurant, near British Museum (separate registration required)

## Day Two

9:00 – 9:15	Introductory comments for second day
9:15 – 10:45	<p><b>Session 5: Approaches in common law jurisdictions (UK / Australia)</b></p> <ul style="list-style-type: none"> <li>• ‘Undesirable and Unreturnable in the United Kingdom’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Sarah Singer, Refugee Law Initiative, University of London, UK</i></li> </ul> </li> <li>• ‘Undesirable, Unreturnable and No Effective Remedy: UK Country Report’ <ul style="list-style-type: none"> <li>◦ <i>Sheona York, Kent Law Clinic, University of Kent, UK</i></li> </ul> </li> <li>• ‘Country Report: Australia’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Satvinder Juss, King’s College London, UK</i></li> </ul> </li> </ul>
10:45 – 11:00	Coffee/tea break
11:00 – 12:00	<p><b>Session 6: Approaches in common law jurisdictions (North America)</b></p> <ul style="list-style-type: none"> <li>• ‘Country Report: Canada’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Jennifer Bond, University of Ottawa, Canada</i></li> </ul> </li> <li>• ‘Deportation and Detention in the US: Human Rights Principles and the Treatment of Unreturnable Migrants’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Rebecca Sharpless, University of Miami School of Law, USA</i></li> </ul> </li> </ul>
12:00 – 12:45	Lunch break



12:45 – 14:15	<p><b>Session 7: Approaches in other countries</b></p> <ul style="list-style-type: none"> <li>• ‘Undesirable and Unreturnable in Brazil: Refuge, Exclusion and Illegal Acts’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Liliana Jubilut, Universidade Católica de Santos, Brazil</i></li> </ul> </li> <li>• ‘Turkey: The Challenging Problem of “undesirable and unreturnable” Asylum Seekers’ <ul style="list-style-type: none"> <li>◦ <i>Didem Dogar, McGill University, Canada</i></li> </ul> </li> <li>• ‘Invisible People: Suspected LTTE Fighters in Special Refugee Camps of Tamilnadu’ <ul style="list-style-type: none"> <li>◦ <i>Dr. Sreekumar Panicker Kodyath, NA Palkhivala Academy of Advanced Legal Studies and Research, Calicut, India (co-author Sheethal Paadathu Veettil, Tata Institute of Social Sciences, Mumbai)</i></li> </ul> </li> </ul>
14.15 - 14.30	Coffee/tea break
14.30 - 16:00	<p><b>Session 8: Approaches by international organizations</b></p> <ul style="list-style-type: none"> <li>• ‘Refugee Adjudication under the UNHCR’s Statute or Mandate and the Exclusion Dilemma’ <ul style="list-style-type: none"> <li>◦ <i>Prof. James Simeon, York University, Canada</i></li> </ul> </li> <li>• ‘Union Law Solutions for Excluded Persons’ <ul style="list-style-type: none"> <li>◦ <i>Prof. Hemme Battjes, Vrije Universiteit Amsterdam, Netherlands</i></li> </ul> </li> <li>• ‘Non-removable Returnees under European Union law – Status Quo and Possible Developments’ <ul style="list-style-type: none"> <li>◦ <i>Mr. Fabian Lutz, European Commission, Brussels</i></li> </ul> </li> </ul>
16:00 – 16:30	<b>Session 9: Roundtable Discussion: Towards harmonised solutions</b>
16:30 – 16:45	Concluding remarks and farewells – <i>Dr. David James Cantor</i> and <i>Dr. Joris van Wijk</i>

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Excluded asylum seekers and other migrants who are *undesirable* because of alleged involvement in serious criminality, but *unreturnable* due to legal or practical reasons, may present decision makers, policy makers and the responsible politicians with significant challenges. While there are different short-term policy responses to the issue, a considerable group of these individuals will always remain in legal limbo, sometimes for many years. A coherent solution is currently lacking, as is guidance on how to deal with this group of persons. Building upon two network meetings with academics and practitioners, this document defines the problem, describes current state responses and explores possibilities of future policy solutions.

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